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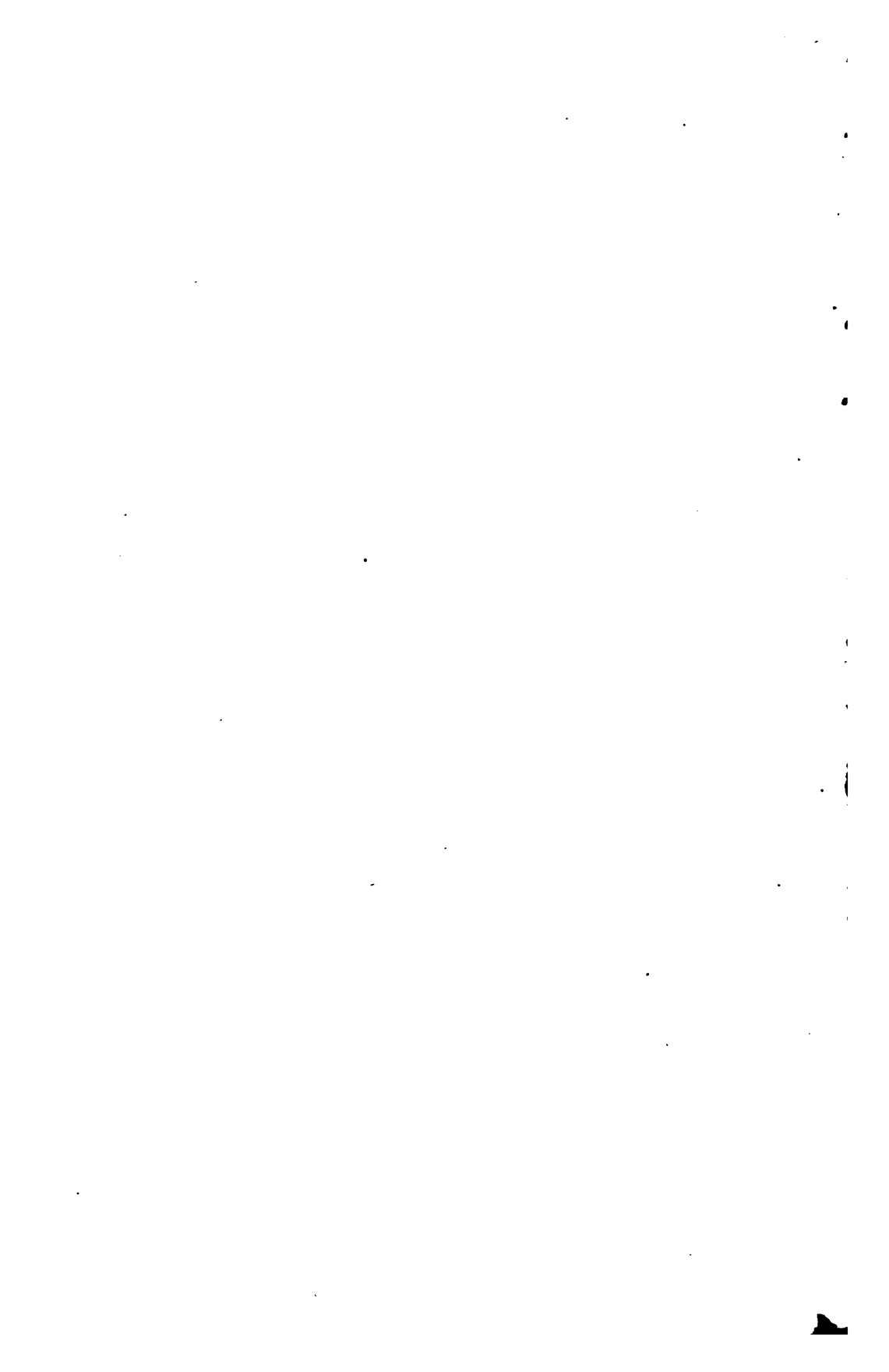
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CASES
ARGUED AND ADJUDGED
IN THE
COURT OF APPEALS
OF THE
STATE OF TEXAS

DURING
THE LATTER PART OF THE AUSTIN TERM, 1881, THE TYLER
TERM, 1881, AND THE GALVESTON TERM, 1882.

REPORTED BY
JACKSON & JACKSON.

VOL. XI.

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COURT OF APPEALS OF THE STATE OF TEXAS.

PRESIDING JUDGE:

HON. JOHN P. WHITE.

JUDGES:

HON. CLINTON M. WINKLER.¹

HON. JAMES M. HURT.

HON. SAMUEL A. WILSON.²

ATTORNEY-GENERAL:

J. H. McLEARY, Esq.

ASSISTANT ATTORNEY-GENERAL:

HORACE CHILTON, Esq.

CLERKS:

JAMES L. WHITE, AT AUSTIN.

E. P. SMITH, AT TYLER.

CHARLES S. MORSE, AT GALVESTON.³

HORACE A. MORSE, AT GALVESTON.⁴

REPORTERS:

A. M. JACKSON.

A. M. JACKSON, JR.

¹ Died May 13, 1882.

² Appointed May 18, 1882.

³ Resigned November 30, 1881.

⁴ Appointed December 1, 1881.

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AT THE TYLER TERM, 1881.**

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Austin v. State	Denton	Felony	Affirmed.
Baker v. State	Hunt	Felony	Affirmed.
Betsche v. State	Austin	Felony	Affirmed.
Brown v. State	Bexar	Felony	Affirmed.
Cauldin v. State	Jasper	Felony	Dismissed.
Cohea v. State	Gonzales ..	Felony	Affirmed.
Cook v. State	Washington	Felony	Affirmed.
Davis v. State	Colorado ...	Felony	Affirmed.
Davis v. State	Gonzales ...	Felony	Affirmed.
Edwards v. State	Cooke	Felony	Affirmed.
Frosh v. State	Washington	Felony	Affirmed.
Fundaburk v. State	Navarro	Felony	Affirmed.
Garcia v. State	McMullen ..	Felony	Affirmed.
Goode v. State	Falls	Felony	Affirmed.
Graham v. State	Lamar	Felony	Affirmed.
Harris v. State	Colorado ...	Felony	Affirmed.
Hawkins v. State	Franklin ...	Felony	Affirmed.
Henry v. State	Houston	Felony	Affirmed.
Hursh v. State	Cooke	Felony	Affirmed.
Hursh v. State	Cooke	Felony	Affirmed.
Jackson v. State	Bowie	Felony	Abated.
Johnson v. State	Tarrant	Felony	Affirmed.
Lacy v. State	Gregg	Felony	Affirmed.
Mathews v. State	Travis	Felony	Withdr'n.
McGee v. State	Jasper	Felony	Dismissed.
McKain v. State	Jasper	Felony	Affirmed.
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Overstreet v. State	McLennan ..	Felony	Affirmed.
Petty v. State	Washington	Felony	Affirmed.
Rivas v. State	Bexar	Felony	Affirmed.
Scott v. State	Bexar	Felony	Affirmed.
Sledge v. State	Bexar	Felony	Affirmed.
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Vaughn v. State	Lampasas ..	Felony	Affirmed.
Wilson v. State	Cooke	Felony	Affirmed.
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Gordon v. State	Hood	Misdemeanor	Dismissed.
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viii CAUSES DECIDED WITHOUT WRITTEN OPINIONS.

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Hunsucker v. State.....	Hopkins ..	Misdemeanor ..	Affirmed.
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May v. State.....	Bosque.....	Misdemeanor ..	Dismissed.
McAmis v. State.....	Delta ..	Misdemeanor ..	Affirmed.
Porter v. State.....	Rusk ..	Misdemeanor ..	Dismissed.
Smith v. State.....	Delta ..	Misdemeanor ..	Affirmed.
Whitworth v. State	Bell ..	Misdemeanor ..	Affirmed.
Wright v. State.....	Travis.....	Misdemeanor ..	Affirmed.
Hart v. State.....	Bowie ..	Scire Facias ..	Dismissed.
Moore v. State.....	Van Zandt ..	Scire Facias ..	Dismissed.
Robinson v. State.....	Burleson ..	Scire Facias ..	Affirmed.
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Smith v. State.....	Cherokee ..	Scire Facias ..	Dismissed.
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Ex parte Henton.....	Dallas.....	Habeas Corpus ..	Affirmed.

CRIMINAL CAUSES DECIDED WITHOUT WRITTEN OPINIONS
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STYLE OF CASE.	COUNTY.	GRADE OF OFFENSE.	DISPOSITION.
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Anderson v. State.....	Jefferson ..	Felony	Affirmed.
Anschicks v. State.....	Milam	Felony	Affirmed.
Ayers v. State.....	Bexar	Felony	Affirmed.
Bankston v. State.....	Harris	Felony	Affirmed.
Bledsoe v. State.....	Johnson....	Felony	Affirmed.
Bouldin v. State.....	Gonzales ..	Felony	Affirmed.
Buchanan v. State.....	McLennan ..	Felony	Affirmed.
Clay v. State.....	La Salle ..	Felony	Affirmed.
Cummins v. State.....	Grayson....	Felony	Dismissed.
Ethredge v. State.....	Johnson....	Felony	Affirmed.
Evans v. State.....	Bexar	Felony	Affirmed.
Freeman v. State.....	Grayson....	Felony	Dismissed.
Gonzales v. State.....	Cameron ..	Felony	Affirmed.
Hernandez v. State.....	Bexar	Felony	Affirmed.
Isaacs v. State.....	Fayette	Felony	Affirmed.
Jernigan v. State.....	Brown	Felony	Affirmed.
Jernigan v. State.....	Brown	Felony	Affirmed.
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STYLE OF CASE.	COUNTY.	GRADE OF OFFENSE.	DISPOSITION.
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Lamkin v. State	Gonzales ...	Felony	Affirmed.
Lowe v. State.....	Ellis	Felony	Dismissed.
Monroe v. State.....	Fayette	Felony	Affirmed.
Murphy v. State.....	Bexar	Felony	Affirmed.
Payne v. State.....	Gonzales ...	Felony	Affirmed.
Price v. State.....	Gonzales ...	Felony	Affirmed.
Ravey v. State.....	Bexar	Felony	Affirmed.
Scallorn v. State	Fayette	Felony	Affirmed.
Scott v. State.....	Galveston ...	Felony	Affirmed.
Stephens v. State.....	Galveston ...	Felony	Dismissed.
Thompson v. State.....	Grayson ...	Felony	Dismissed.
Thompson v. State.....	Travis	Felony	Affirmed.
Wallace v. State.....	Grimes	Felony	Affirmed.
Whiteley v. State.....	Galveston ...	Felony	Affirmed.
Williamson v. State.....	Erath	Felony	Affirmed.
Allen v. State.....	Fayette	Misdemeanor ..	Affirmed.
Cannon v. State.....	Houston ...	Misdemeanor ..	Affirmed.
Dart v. State.....	Brazoria ...	Misdemeanor ..	Dismissed.
Felker v. State.....	Grimes	Misdemeanor ..	Affirmed.
Foster v. State.....	Fort Bend..	Misdemeanor ..	Dismissed.
Hawkins v. State	Brazoria ...	Misdemeanor ..	Affirmed.
Hughes v. State.....	Polk	Misdemeanor ..	Affirmed.
Johnson v. State.....	Fayette	Misdemeanor ..	Affirmed.
Monroe v. State.....	Webb	Misdemeanor ..	Dismissed.
Roller v. State.....	Freestone ..	Misdemeanor ..	Affirmed.
Smith v. State	Lavaca	Misdemeanor ..	Affirmed.
Sobotek v. State	Fayette	Misdemeanor ..	Dismissed.
Starling v. State	Houston ...	Misdemeanor ..	Dismissed.
Vega v. State	Cameron ...	Misdemeanor ..	Affirmed.
Walker v. State.....	Fayette	Misdemeanor ..	Affirmed.
Walker v. State.....	Gonzales ...	Misdemeanor ..	Affirmed.
Walker v. State.....	Gonzales ...	Misdemeanor ..	Affirmed.
Works v. State.....	Jackson ...	Misdemeanor ..	Dismissed.
Blackman v. State	Freestone ..	Scire Facias ..	Affirmed.
Davidson v. State.....	Fort Bend..	Scire Facias ..	Dismissed.
Ex parte Wright.....	Atascosa ...	Habeas Corpus	Affirmed.

IN MEMORIAM.

The Hon. Clinton M. Winkler, one of the judges of the Court of Appeals, died in the city of Austin at an early hour of Saturday, the 13th of May, 1882, after a brief illness incurred while he was sedulously engaged in his official labors. His remains were escorted to his home at Corsicana by Chief Justice Gould of the Supreme Court, Presiding Judge White of the Court of Appeals, Judge Watts of the Commission of Appeals, a guard of Knights Templar, and many friends.

Judge Winkler was born in Burke county, North Carolina, on the 19th day of October, 1821. In 1840 he came to the then Republic of Texas, and thenceforth his life and fortunes were identified with those of the people of Texas. A long career of public service and private worth established him so high in their esteem and affections that his death was the signal for a requiem as universal as it was spontaneous and sincere.

At an assembly of the bar of the city of Austin, with many of their professional brethren attendant from elsewhere upon the three appellate courts in session at the State capital, the following resolutions were adopted, and Charles S. West, Esq., A. M. Jackson, Esq., and Hon. J. H. McLeary, Attorney General, were respectively appointed to present the resolutions to the courts.

RESOLUTIONS.

“WHEREAS, The Hon. C. M. Winkler, Judge of the Court of Appeals of the State of Texas, has departed this life in the midst of his usefulness and while engaged in the faithful discharge of the responsible duties entrusted to him by the people of the State; be it

“*Resolved*, 1. That the bar now in attendance not only

give utterance to their own sentiments but echo those of their brethren throughout the State of Texas in deploring the death of the deceased judge as a public calamity of no ordinary moment.

“2. That so long as unselfish patriotism, unsullied integrity, and fidelity to every trust and duty, whether public or private, shall be held in esteem, that long will the name and memory of C. M. Winkler be enshrined in the annals of Texas and the hearts of her people.

“3. That we tender to the family of the lamented deceased our most heartfelt sympathy in their bereavement and sorrow, and the secretary of this meeting is instructed to communicate to them these resolutions.”

On the opening of the Supreme Court, Wednesday, May 17, 1882, the foregoing resolutions were presented by C. S. West, Esq., in the following terms:

May it please the Court:—The melancholy duty has been assigned me by my brethren of the bar, recently assembled in this chamber, from different and distant portions of the State, of presenting to your honors for such official action as may be deemed most fitting and appropriate, a series of resolutions adopted by them expressive of their respect for the memory of the Hon. C. M. Winkler, one of the judges of the Court of Appeals, who died in this city on Saturday last.

In discharging this duty, your honors will willingly indulge me in making a few observations proper to such an occasion, on the character of the deceased, who in life was so very highly esteemed, and, I may say without exaggeration, loved by all of us.

In speaking of his many virtues, I speak advisedly, not unmindful of this solemn occasion and of this high presence; not unmindful that I speak not alone for myself, as a private individual, but as the voice and selected organ of the bar of this great State. Commissioned by them to communicate to this court their profound sorrow, and to bear testimony in their behalf to their deep sense of the loss experienced by his death, and also to dwell for a brief period of time upon the many virtues and amiable traits of character possessed in so marked a degree by the deceased, it cannot be regarded as saying too much to say that the death of such a worthy citizen in the days of his usefulness is not only a great loss to the bench and bar, but a severe loss to the whole State at large, to whose service his time and his labor were most unselfishly devoted.

Without going at all into the details of his life, it may be said, that from 1840-1, the date of Judge Winkler's arrival in Texas, not having then quite reached his majority, down to the day of his death, he stood

high in the esteem and confidence of those among whom he lived. In the year 1843, he held the humble position of deputy district clerk, and, if my memory is not at fault, had before that time taught a small school.

In 1844 he was promoted by the people of old Robertson county, who esteemed him from the first to the last, to the responsible and honorable position of clerk of the District Court of that county.

During the period of his clerkship he studied his profession, and was admitted to the bar, where his standing was from the beginning good.

In 1847 he was elected a member of the second Legislature that assembled after annexation. In 1861 he took up arms on behalf of the South in the civil war then being carried on, and was a member of the famous fourth Texas infantry, originally commanded by General Hood, and to the command of which the deceased himself attained near the close of the war.

In 1866 he was declared to be elected judge of the thirteenth judicial district, and received the certificate of election, took the oath of qualification and received his commission, and entered on the discharge of his duty, but learning shortly afterwards that his honorable competitor had in fact received the majority of the votes cast, he at once surrendered the office. He took no advice of counsel as to his legal rights. He interposed no special plea or technical objection. It was enough for him to know, and he knew it by instinct, that the true title to the office did not consist in the certificate of election, nor in the commission, but existed in the people, and could not rightfully be held by any one, except that person upon whom the people had, by their suffrages, cast the title. He scorned to take advantage of any quibble to hold as his own that which the people in their wisdom had seen fit to confer, and worthily, upon another.

In 1873 he was a member of the thirteenth Legislature, and in that body represented the interests of his immediate constituency, and of the State at large, ably and faithfully.

In 1876 he was elected by the people of the State one of the judges of the Court of Appeals. This high and responsible position he held at the time of his death.

This hasty and defective enumeration of the offices filled in his lifetime by the deceased, bears honorable testimony to the esteem in which he was held. He so conducted himself in official positions, on all occasions, that he to the end possessed the unbounded confidence of the people who had confided these high trusts to his keeping, and the duties of which he discharged faithfully.

As a judge, the ten volumes of the published reports of the Court of Appeals tell the story of his industry and devotion to duty.

He was not blessed with that Heaven-descended faculty or gift, called "genius," but very fortunately for our profession it does not require genius or extraordinary inspiration to make a good and faithful lawyer,

and an able and upright judge. Judge Winkler was nevertheless a very useful and valuable member of the Court of Appeals. In the consultation room he brought to the consideration of every case the fruits of a large experience, gained by his long connection with the bar as a practicing attorney.

He was possessed, too, of a thorough knowledge of our Penal Code and Code of Criminal Procedure, and, as his opinions show, was familiar with that branch of the science of pleading which relates to the requirements of indictments, informations, and the drafting of the various exceptions and special pleas, with reference to which questions of difficulty are continually arising in the court of which he was an honored member. In addition to these qualifications, he brought to the disposition of all causes a patience, a mental serenity, a sweetness of temper, a love of truth and of justice for their own sakes, and an even judgment tempered with mercy, that rendered him a very valuable adjunct to his learned associates in their efforts to arrive at a correct conclusion. He was justly regarded by them and by the bar of the State as a useful and valuable member of that high court.

In all the varied relations of life, as an humble, sincere, devout Christian, as husband, father, neighbor, friend and counselor, or private citizen, he was all that he should have been. What higher praise can be accorded to the dead than this?

Perhaps there was no period in his long and honorable career upon which his many friends and warm advisers looked with more pride, and of which he himself was more proud (if the term pride can be used at all in connection with one so humble, so plain and simple in his manners and tastes as the deceased), than the four dreary years when he wore the grey of the Confederate soldier. When under the mighty leadership of General Lee, and in the command of General Hood, he followed for better or for worse, through sunshine and through storm, in the hour of victory and in the hour of defeat, the battle-scarred flag of the Confederacy.

And, doubtless, hereafter, despite the great value of his civil services and his great worth as a private citizen, he will at last be longest remembered and most tenderly held in recollection as one of the leading spirits in that historic brigade, the flower of her chivalry, that Texas, at the outbreak of the civil war, sent as her quota to guard the sacred soil of old Virginia. The memory of their dead she sacredly preserves and cherishes, as among her most precious possessions, and their names she has written forever, to use the noble hyperbole of Carlyle, "in star fire and immortal tears."

The living she presses to her very heart of hearts, with all the strong affection of a mother for her first born. Nothing that has happened in the past, nothing that exists in the present, and nothing that can or will happen in the future, can diminish in the least, or shake or change so much as a single hair's breadth, her unalterable love

for her dead and her living heroes, who gallantly bore in those dark days her banner to the front. Among them the deceased was conspicuous, and as the last commanding officer of that famous regiment, his memory will long be cherished. His name, as well as that of many other distinguished sons of Texas who have preceded him in the dark valley, should be perpetuated in marble or in bronze. Her illustrious dead have become now the property of Texas; for I firmly believe that the name and the fame of the great men who laid broad and deep the strong foundations of this mighty commonwealth, and of those who came after them, and have faithfully in their day and generation served the State, are a part and parcel of the substantial wealth and capital of Texas, as much so as her reserved public domain or the cash in her overflowing treasury.

It is from the recollection of their great deeds and heroic lives our youths in the present and in the future will draw the inspiration necessary to prepare them to answer the calls of their country, and to discharge the public duties devolving upon them, with an eye single to the public good.

I believe that the poet and the historian should be put under contribution by the State, for the purpose of perpetuating their memories in verse and on the pages of history. That the painter's skill should be invoked to recall their features to our memories. That their names should, by the sculptor's art, be preserved in enduring marble. That they should be considered as heir-looms, precious hereditaments, attached to, and connected through all time with the hereditary freehold itself, to be proudly transmitted by us to those who shall ere long fill our places.

When this is done,—on that day when Texas shall make her jewels up, when she shall prepare her roll of honor,—Judge Winkler's name will occupy no mean or obscure place there.

When we reflect upon his many virtues, and the completeness and the loveliness of his whole character, it will be no surprise in the future for his case to be in some sort a repetition of Abou Ben Adhem's dream, as told in Leigh Hunt's famous verses. When the angel showed Abou the golden book, where were written the names of those who loved the Lord, he modestly asked if his name was one.

“— Not so,

Replied the angel. Abou spoke more low
But cheerily still, and said, I pray you then
Write me as one who loves his fellow men.
The angel wrote and vanished. The next night
It came again with a great awakening light
And showed the names of those whom love of God had blest,
And lo! Ben Adhem's name led all the rest.”

On behalf of my brethren of the bar, I ask that the resolutions be now read and spread upon the minutes of this court, as a mark of respect to the memory of the deceased.

Hon. R. S. Gould, Chief Justice of the Supreme Court, responded as follows:

The members of this court unite with the bar in deploring the death of Judge Winkler, our brother of the Court of Appeals, and most heartily do we join them in their well deserved tribute of respect to his memory.

Judge Winkler was a good man, faithful and true to his convictions of duty in all the relations of life. No one who knew him well could fail to see and to honor the purity, the truthfulness and the kindness of his nature. He was, moreover, endowed with a fearlessness of character and a steadiness of purpose which enabled him to preserve his mental equipoise amid disturbing influences, whilst a conscientious sense of the responsible nature of his duties as a judge, ever stimulated him to laborious and careful investigation. These qualities, added to his long experience, solid attainments and sound judgment as a lawyer, made him a most useful and worthy member of the Court of Appeals. His labors for over six years on that bench will ever connect his name honorably with the judicial history of Texas. The faithfulness of those labors in all probability shortened his life.

We, his brethren of the bench, who have been his daily associates during his judicial career, have seen and honored in the faithful judge who died at his post, the same devotion to his country and to duty which marked the four years of his military life as a brave and trusted leader in Hood's Texas brigade.

My own acquaintance with Judge Winkler dates back full thirty years, when as members of the bar in the same judicial district we were thrown much together. During many of those years our relations have been those of friendship, and I have had many opportunities of knowing and experiencing his worth as a man. To me he has seemed to be one whose life was the outgrowth of a pure and manly heart, a heart full of reverence for his Maker and of good will towards his fellow men.

He was a professing Christian, an humble, unpretentious worshiper of the God revealed in the Bible, and his life was consistent with his profession.

Our brother is no more of this earth — let his name be honored by us, the people of the State of Texas, as that of a patriot soldier, a true hearted man, a wise, just and faithful judge.

Hon. H. M. Bonner, of the Supreme Court, paid the following tribute to the memory of the deceased:

I add a simple heart-felt tribute to the memory of our departed brother — whom living, all loved; dying, all deplored. He was my long cherished and intimate friend, and I can most truly say that he was one of the very best men I ever knew. In both the private and public

walks of life, he was a bright exemplar and has left but few equals behind. His was a practical, every-day illustration of true charity and usefulness—"Help for the living, hope for the dead." He was a most devoted and loving husband and father; a firm and reliable friend and companion; a worthy and useful citizen; a gallant soldier and enlightened statesman, and a pure and able judge. In all the relations of life in which he was called to act he was a good man and true, a noble Christian gentleman, of innate purity and spotless integrity of character, governed by a high sense of honor and a rare conscientious devotion to duty. This devotion, doubtless, shortened his days, as his arduous labors on the bench, even to the very hour when he was confined by his last fatal sickness, will show. He in honor finished his work on earth to enter upon his labor of love in Heaven.

Surely a great and good man has fallen among us.

Though unexpected and sudden, he was not unprepared to meet the dread summons. The very Sabbath before his death he knelt at the altar and partook of the holy sacrament, commemorative of the death and resurrection of Him whom he could then see but by faith, and into whose immediate presence he has since been called. May we, too, be ready even as he was ready, for we know not the day nor the hour.

To his family, his immediate circle of friends and the community in which he lived, his loss will be irreparable. Who can fill his place in church and state? Who in the wide domain of Texas cannot truthfully say, My friend is dead?

On Friday, May 19, 1882, A. M. Jackson, Esq., presented the resolutions to the Court of Appeals, with the following remarks:

If your Honors please:—Not yet have seven years elapsed since the exigencies and the will of the people of Texas called into existence the Court of Appeals, and endowed it with the most solemn and responsible of all the prerogatives arrogated by human institutions—the ultimate determination of the issues of life or death, as well as of the less fearful sanctions devised for the vindication of law and the protection of society against violence and crime. At the same time, and by the same sovereign will, three citizens were selected with rare unanimity to constitute the court, and exercise the plenary powers with which it was invested. And now, though the brief term of their high commission is as yet unexpired, a still more sovereign power has summoned two of those three to that supreme tribunal visible only to the eye of faith, and happily attainable by none but the pure in heart. The Sovereign Arbiter of life and death has pronounced them worthy and well qualified, and called them to Himself.

Early in the morning of Saturday last, the thirteenth instant, Judge C. M. Winkler died in this city. The herald of his divine Master found

him at his post of duty, faithfully and sedulously engaged in its performance. Sudden as the summons may seem to those who loved him, it was not too sudden for him, the sincere and humble Christian, the upright and patriotic citizen, the just and compassionate judge, the intrepid and heroic soldier, the devoted husband and the tender father. In the maturity of his manhood and the prime of his usefulness he is gone, bearing with him the loving gratitude of the people he served so long and so well, in prosperity and adversity, in peace and in war. No neglected trust, no unperformed duty detracts an atom from his well-earned fame.

Leaving to an abler hand all particulars of Judge Winkler's career. I cannot be mistaken in pronouncing it one which in the truest sense was eminently successful. Yet success was not the goal of his ambition. Duty, not success, was the shrine at which he worshiped; the "ends he aimed at were his country's, his God's, and truth's." He embarked in life without accidental or inherited advantages, and owed nothing to chance, nor to other patronage than that of his countrymen, secured by that implicit confidence which he never failed to inspire. Unswerving integrity, indomitable fortitude, and unwavering devotion to duty were the strong supports which sustained the massive proportions of his moral stature. Sound judgment, patient investigation, and untiring industry commended him through life to the good opinion of his fellow-men, and bore him surely and steadily onward and upward, from one public trust to another, until, linked with the purest impartiality and a varied experience, they equipped him admirably for the elevated judicial position in which he rendered the last of that long series of public services by which his name will be inscribed upon the imperishable page destined to perpetuate the memories and achievements of the heroic Texan dead. For not alone in the peaceful paths of the civil affairs of Texas were his services dedicated upon her altars. Early in the stupendous conflict between the states, he speeded to the support of the cause his conscience approved, and, with the pertinacious fidelity so conspicuous in his character, he adhered to that cause amid all its varying fortunes and sanguinary fields, until it passed into history. Sufficient here to say that he proved worthy to bear the banner of Lee, to advance the battle-flag of Jackson, to support the charge of Hood, and to lead the irresistible onset of the invincible Texas brigade.

Therefore it is, may it please your honors, that while the civil history of his times shall associate his name with those of the eminent men who laid firm and true the foundations of Texas jurisprudence, its military annals must enroll it with those of Sidney Johnson and Hood, of Green and Gregg, of McCulloch and Scurry, of Rogers and Terry and Tom Lubbock, and the many others who devoted their lives to the defense of the land they loved so well.

Turning from the public to the private attributes of Judge Winkler, and contemplating all in a single view, is it possible to conceive a char-

acter more complete or more symmetrical? He was the impersonation of sincerity, of truthfulness, of charity in thought and word and deed; yet he was firm and resolute in the maintenance of his convictions or the discharge of what he deemed his duty. Modest in his estimate of himself, considerate of the feelings as well as the rights of others, however humble they might be, faithful to his friends, and in the domestic circle all that womanly love could crave or filial affection hope for, he embodied, take him all in all, the ideal conception of the worthy follower of that Being who has now called him to his reward.

Such and more, may it please your honors, was he with whom you will consult no more upon any of the concerns of this life, and as such and more he was appreciated by the community in which he lived. Borne hence, that his remains may find their last earthly resting place among his kindred and neighbors, nothing could have been more impressive than the heartfelt tribute of the vast concourse who, comprising all ages and conditions, assembled around his grave. There, guarded by a people he loved and who loved him, "after life's fitful fever he sleeps well," while to us it remains to cherish his memory in our hearts and emulate his example in our lives.

To acquit myself now of a duty enjoined upon me by the bar of this and other courts in session at this place, I present to your honors certain resolutions of their adoption, and ask that they be entered upon the record of the court.

Horace Chilton, Esq., Assistant Attorney General, addressed the court, as follows:

My official association with Judge Winkler justifies me in adding another to the multiplied expressions which have followed his decease.

The state of the business of this court offered me a few days of respite in last week, and, while at my home in the east, his mortal illness began and terminated. Thus was I spared the bitterness and denied the consolation of clasping his dying hand, of watching his serene Christian nature in its final and victorious grappling with the uncertainties of impending death.

Moderation, benevolence, courage, diligence, well-poised judgment—these are the merits which signalize his name. The virtues of Washington were not more exalted.

Those more familiar with his life may elaborate the eulogy by collecting reminiscences illustrative of his character, but the bowed heads of thousands not thus familiar do honor this day to the valorous soldier and the just judge.

Hon. John P. White, Presiding Judge of the Court of Appeals, responded thus to the resolutions and addresses:

Doubtless, gentlemen, it were well could we but substitute the "eloquence of silence for the set phrase of speech" in response to your kind

resolutions and eloquent address, which on this solemn occasion have aroused emotions no language at our command can sufficiently express. Six years ago, on the eighteenth day of April, 1876, the Court of Appeals of Texas was organized, under the Constitution and laws, in the old Supreme Court building on capitol hill, the Hon. M. D. Ector and C. M. Winkler, with your humble speaker, occupying the bench, and with W. F. Faris at Austin, Captain Thomas Smith at Tyler, and Charles S. Morse at Galveston, filling the clerkships at the three branches. In this short space of time, two judges and two clerks have been called to their last account. First went the genial Faris; next our Presiding Judge Ector; then Captain Smith; and now, with our recent sorrow fresh upon us, we meet to pay our last sad tribute to the memory of the lamented Judge Winkler. Two-thirds of our number in six short years! The reflection is sad and mournful, but it is fraught with the solemn truth of its ever recurring lesson, that man is mortal, and that it is appointed unto all men once to die. It tells us that the "pale monster" beats with equal footstep at the palace as at the hovel — at the high as at the low places of earth, and that all said, at last, the path of glory also leads but to the grave. Ector and Winkler! Winkler and Ector! Honored in life! honored in death! these two, indeed, trod the ways of glory and sounded all the depths and shoals of honor along the voyage of life! Identified in the last years of their usefulness and labors, it is a melancholy pleasure to remember many striking similarities of character, and dwell upon the singular coincidences which marked their careers. Twin brothers in the proudest heritage of honor, it is a mournful privilege to consider the two together.

As private citizens, none were ever held in higher or more deserved esteem. Twice was each of them called to serve as legislators; Judge Ector once in Georgia before immigrating to Texas, and once here in the State of his adoption; Judge Winkler served both times in Texas, first in the second Legislature after annexation, and again in the thirteenth, a quarter of a century afterwards. How truly and well each of them performed their parts as lawgivers, contemporaneous history and our just and equitable system of laws — in part their handiwork, deservedly the pride of our own and the admiration of other States — sufficiently attest.

As soldiers both did honorable service for their country, and won high distinction as military men, the one wielding the sword of a brigadier-general, the other that of a colonel, at times commanding his division. When quite a youth, Judge Winkler united his fortunes with the young Republic of Texas. Locating upon the border, he never failed as a bold and daring young frontiersman to respond, in those early days, to every call made by Texas, when her infant civilization or bleeding frontier demanded protection from the merciless savage. Many the time and oft, with the gallant "rangers" of those days, did he endure all manner of self-imposed hardship that the cabin of the

pioneer might be saved from the blazing torch; that his cornfields might not receive baptism from the blood of his sons, and that the cradled sleep of his infant might not be disturbed by the war-whoop of the blood-thirsty Indian. To him, as much as to any single private individual, Texas owes the peace, quiet and success of the efforts at the permanent settlement and the extension of civilization over the northwestern domain.

But we might pass by those times of trial and danger — than which none are fuller of glory, or more entitled to honorable mention, since to them we owe in no small measure the prosperity and greatness of our grand empire state — we might pass those early days, and coming down to the war between the states, consider Judges Ector and Winkler with just pride and admiration, as heroes and soldiers of the “lost cause.” From subordinate positions both rose to high rank in the two principal divisions of the Confederate army, the former losing a leg while in his native State, Georgia, the latter twice staining the soil of old Virginia with blood from wounds which he received on historical battlefields under the leadership of Hood, of Jackson and of Lee.

Whilst Ector, with all the impassioned energies of a nature ever devoted to duty, was maintaining to the best of his abilities the unequal contest on the bloody fields of the southwest, the manly form of Winkler in the army of northern Virginia was ever to be seen towering, like that of Saul, above all his fellows in the forefront of the fight, and wherever deathshots were thickest and danger greatest, there he was wont to lead and animate the van with that same reckless courage with which “of old ’twas said the gay, white plume of Henry of Navarre danced ever on the surge of battle.” The soil of old Virginia, which contains within its ancient bosom more buried honor than the sun, in all his daily circuit, shines upon, contains enshrined in glory no more chivalric soul or knightly spirit than those which nerved the arm or throbbed the bosom of an Ector or a Winkler. They were marked and noted soldiers amongst the hundred thousands where every man was a soldier, and every soldier a hero. To appreciate their worth as soldiers, you should have seen, as I did, the streaming eyes and mourning countenances of those few surviving comrades who followed each to the tomb, scarred veterans, whose devoted love for their old leaders the many changes of time had scarcely tempered, much less obliterated.

The bloody, but fruitless contest ended, both returned with broken, ruined fortunes, to begin again the contests of life, each accepting the inevitable with manly submission, and by his energy and devotion to duty attaining the highest rank in the noblest of all professions, and proving by successes that “peace, too, hath her victories, no less renowned than war.”

No two men in the private walks of life did more by counsel or example to revive the hopes and confidence of a ruined people, or to restore Texas to her former position as a State, entitled to all her just and proper

relations in the Federal government. Those objects being at length fully accomplished, and our people, having adopted a Constitution of their own choice, by their free voice called them to occupy a seat upon the new Court of Appeals to be organized under its provisions. How well they have performed the high trust thus confided to their keeping, how well they have administered the law in behalf of the life and liberty of the citizen, is a matter for others to discuss and determine. We know, of a verity, how incessantly they toiled night and day, how earnestly they strove for justice and the right, how the consciousness of an ever-present sense of gravest responsibility never deserted them, and we know that for them it can be truly said whatever of error may have crept into the decisions of the court, has been error of head and not of heart. No man can ever truthfully question the incorruptibility of their acts, or purity of their motives.

An eminent divine of Richmond, Virginia, the Rev. T. V. Moore, on an occasion similar to this, paid so eloquent and appropriate a tribute to the blessings of a pure judiciary, that I cannot resist the temptation to reproduce it. He said:

"Next to a pure gospel, in any country, is a pure judiciary, without which it must perish. The executive and legislative departments of government represent the people, and of course must reflect their changing phases; but the judiciary represents God, for it represents justice, which is His awful prerogative; and it represents law. . . . An upright judiciary is the last protection of the helpless and friendless against the mad clamor of passion from below, or the tyrannous grasp of power from above; the poor man's portion, the widow's shield; the orphan's protector against outrage and injustice; the vindicator of injured innocence, the strong arm thrown around the victims of prejudice and persecution, the very citadel of public liberty, the very palladium of private right. So universal is this truth, that the inspired Psalmist many generations ago declared that where the judiciary were venal, partial or corrupt, 'all the foundations of the earth were out of course.' Hence, an upright, inflexible judge, whose mind is clear and whose heart is pure, who knows no man after the flesh, who holds the scale of justice with a hand which neither fear or favor can cause to swerve, who dwells in an elevation of calm dignity that knows not and feels not the swayings of lower passions and influences, and who never descends to lend himself to any unworthy scheme, is a blessing to any community, the priceless value of which can only be known by reading the history of the unhappy people who have been cursed by those names of judicial infamy that are pilloried in the history of the past."

Here in the midst of their labors, here from the bench they occupied, we feel that it is not fulsome flattery to declare that, in our estimation, the judicial lives of Judges Ector and Winkler filled to the fullest measure the high and true standard of excellence thus so beautifully expressed and portrayed. Two such men cannot easily be forgotten;

their work and their example must live after to remind us always of them.

Extinguished too soon for ours and the good of the State, for them the light of life went out only in the noon-tide of honor, leaving behind each a bright and perfect escutcheon, upon whose pure surface there is no semblance of spot or stain. Each wore the "white feather of a blameless life." True representatives of justice, they sleep the last sleep of the just. They have gone to take merited rank with the illustrious dead of Texas, their silent tents being spread alongside those of Hemphill, Lipscomb and Wheeler on "fame's eternal camping ground."

When considered in the light of its own individuality, the common sentiment of all who knew him must accord to the character of Judge Winkler the description which Horace, the Latin poet, gives of the perfect citizen: "A man tenacious of his purposes, and unmoved either by the frowns of a threatening tyrant, or the pressure of a mob clamoring for evil." Beyond this, a more evenly adjusted, well regulated character rarely existed. Tried in many things, he has been found wanting in none. As well remarked by a friend on the night of his death: "No man ever had a better record to die on."

It will be our pleasure always to remember him as a judge of the Court of Appeals. Here his status is fixed, and his character ingrained and identified with its very being from the beginning to the present time. Here he needs no sounding eulogy, no moving strains of poetry or song, no sculptured marble or animated bust to perpetuate a memory which has its tablet on every side, and a monument more lasting than brass on every page of its history. It is ours to recollect him as a guide, counselor and friend; as the ever true, ever faithful, ever honest, ever devoted lawyer and judge. Perfect as 'tis given man to be in all the relations of life, here he was esteemed the personification of greatness and goodness combined. Such is the exalted niche history will reserve for him in her temple of fame; such the high station other men and after times must justly accord him; as such it will ever be our highest delight to contemplate and honor him; and we feel assured that as such it may be said of him as of the tall pine of Scotland:

"Ours is no sapling chance sown by the fountain,
Blooming in springtime, in winter to fade;
When the whirlwind has stripped every leaf on the mountain,
The more shall Clan Alpine exult in her shade.
Moored in the rifted rock,
Proof to the tempest shock,
Firmer he roots him, the ruder the blow.

Worthy citizen! devoted patriot! incorruptible judge! noble gentleman! humble Christian! Ours be it to emulate his many virtues, and follow in the track of his high example, so that when we have obeyed the dread summons of the last Conqueror, there may be in store for us, as for him, those sad but endearing tributes of a bereaved people, sor-

rowing tears upon the cheeks of innocence, heartfelt sighs from the bosom of virtue, the young wishing to resemble and the aged lamenting to loose us.

At the opening of the Commission of Appeals on May 22, 1882, the Hon. J. H. McLeary presented the resolutions, with the following address:

May it please the court:— A sorrowful task has fallen to my lot. In the name of the bar of Texas, is it my duty to offer for the consideration of this honorable court a tribute of respect to the Hon. Clinton M. Winkler, late judge of the Court of Appeals of this State.

On the 18th inst. he was summoned to appear before a tribunal from which there can be no appeal, and to hear from the judge of all the earth the merited plaudit of, "Well done, thou good and faithful servant, enter thou into the joy of thy Lord."

The resolutions of the bar speak so fully, though briefly, the sorrow and the gloom which this melancholy event has cast over our people, that there is little left for me to say in presenting them to the bench. In the other high courts already have eulogies been pronounced in terms so elaborate and words so eloquent, by my elders in the profession, that it seems as if there were not room to lay another flower upon the tomb of him whose death we this day mourn.

Much has been said, but too much can hardly be said of the perfection of his character as a man. His was one of those noble natures in which the defects (for what man has them not) were totally obscured by the brightness of his many virtues. It was not my good fortune to be very intimate with him in private life, but I have met him in a band of brothers, where he towered among his fellows as a counselor worthy to be heard and an exemplar fit to be followed. Living, he received at their hands the highest honors in their gift; and dead, his memory is enshrined in the hearts of that fraternity, to whom he has bequeathed the loving care of his widow and his orphans.

Others have spoken in words of burning truth of the glorious deeds which he has done in days gone by upon the field of battle. He answered to the first bugle note which sounded, calling him, with other sons of Texas, from the forum to the field. He followed the fortunes of a cause now lost, through all the ebbs and floods of war, in the sunshine of victory and in the gloom of defeat, now storming the heights of Gettysburg, now turning back the charger of his chieftain at the Wilderness, but ever treading in the narrow path of a soldier's duty till the stars and bars went down on the field of Appomattox.

Then he returned to the walks of peace. He shared the fortunes of a ruined people, and lent his aid in rebuilding the prosperity of his country, wrecked and stranded by the tempest of civil strife. He was ere

long called to renew his course as a legislator, and to begin his career as a jurist.

But however much we may admire his character as a man or his fame as a soldier, it is to his record as a judge that lawyer's look with the greatest satisfaction. Heroes have challenged the admiration of the world by their valor; and poets have embalmed their deeds in immortal song; astronomers have swept the universe with their telescopes and written their names upon the stars; every field of science, literature and adventure has developed the highest types of manly excellence; but the perfect judge who has the capacity to understand his duty and the integrity to perform it at every hazard, for many-sided symmetry and true elevation of character excels them all. The highest courage which can animate the human heart is moral courage. It is such bravery as theirs that must bear up the lofty spirit of the impartial judge as he holds the scales of justice between his fellow men. The base suggestions of self interest must not warp his judgment, cloud his intellect, or cause his hand to falter. The treacherous whisper of detraction, the foul breath of slander, or even the howlings of the mob itself must not shake or slacken his high purpose and his firm motives. The pure metal of an honest heart must be polished and brightened by the increasing exertions of a vigorous intellect. An honest purpose will avail but little should he grope his way in darkness unaided by the light of a sound discretion and liberal learning. However great his own experience, he should add thereto the stores of knowledge that have been garnered up for ages by the great reapers and gleaners that have gone before. If a judge would attain the very summit of perfection, he must have honesty for the foundation stone of his character. To his honesty let him add discretion; and to his discretion, ability; and to his ability, learning; and to his learning, industry; and to his industry, patience; and to his patience, zeal; and to his zeal, fidelity; and to his fidelity, fairness; and to his fairness, temperance; and to his temperance, truth; and let him crown this pyramid of perfection with the most priceless of all stones, the gem of justice. Such is the lofty ideal of what a judge should be, presented to my mind by a contemplation of the exalted duties of that high station. The character of a perfect judge may well make upon the mind of the novelist an impression similar to that produced by the ideal image of Apollo, that perfect type of manly beauty, upon the cultivated fancy of the Greek sculptor. However, no human soul has yet filled up the measure of perfection; no human effort has yet accomplished the attainment of the highest good. But many bold hearts have dared to enter the race for this glittering goal, and have far outstripped their fellows though they have not won the prize.

How far the lamented judge whose memory we this day honor approached this exalted standard is not for me to say. Let the searcher of all hearts determine.

I only know that of the many exalted virtues which are inwrought

together in making up the diadem, he had his share. His name is written in letters as indelible as they are honorable, on the judicial history of our State. Let us hope that it is also written in that brighter book which shall be opened at the end of time, the record of eternal hope.

Charles S. Morse, Esq., then made the following remarks:

May it please the court: I feel that I also have something to offer as a tribute to the memory of our friend.

I call him friend, and I feel proud that my humble walk in life has been such that he honored me with his friendship.

More than once in the last twelve years has that friendship been tested, and as many times has it been found as true as the needle to the pole.

When his Christian spirit plumed itself for flight, and the last breath had been drawn, as I bent over his lifeless form, and gently closed the lids over his sightless eyes, his gentle, loving wife, looking up at me through her fast falling tears, remarked: "He was your best friend."

And she was right. Six short years ago, when the Court of Appeals, of which he was a member, was organized, it was through his kindness and friendship that I was appointed by the court as their clerk at Galveston. A few months since, when the office of clerk of the Supreme Court was made vacant by the death of that faithful old clerk, W. P. Denormandie, it was Judge Winkler who headed the other members of his court and the judges of the Commission of Appeals, and went in a body to suggest my name to the Supreme Court for the position.

Much has been said of the love entertained for Judge Winkler by all of the judges of our higher courts. He is not here to tell of the love he had for them, but I feel secure in saying he loved them all. But a few days before his death, and during the temporary absence of Judge White, he came into my office and said: "I feel lost since Judge White left; when he is absent I feel as if something is wanting." In the conversation which then followed, he remarked that in all the years he and Judge White had been together, not one harsh or unkind word had passed between them. During the five years that I was with that court, I have often noticed the strong love that existed between these two men. I also know that he entertained the most friendly feelings for his associate, Judge Hurt.

I have but a few words to say, for I assure you that my heart is yet too full to give free utterance to my feelings, and I well know that nothing I can say will add materially to the beautiful tributes already paid to his memory.

As a soldier, except historically, I knew him not; but as a patriotic statesman, as an able legislator, as an honest man and upright judge, I knew him well.

Yet there is still another walk in life in which I knew him, and there,

perhaps, I knew him best. I knew him in the lodge-room. As a master mason, I have often seen him, trowel in hand, spreading the cement of brotherly love among his brethren, and with words of wisdom as wise as those ever uttered by Our Grand Master Solomon himself, healing dissensions and discord whenever they arose among the craft.

I have toiled with him in the quarries, and presided with him in the council chambers of the Tabernacle. I have seen him laying the foundations for younger companions, upon which they might safely build their moral and masonic edifice. I have seen him bringing the blind by a way they knew not; leading them in paths they had not known; making darkness light before them and crooked things straight.

Climbing still higher up the masonic ladder, I have seen him as a Knight Templar, giving alms to poor and weary pilgrims traveling from afar. I have seen him succoring the needy, feeding the hungry and binding up the wounds of the afflicted.

His heart was so soft, his nature so gentle, that the appeal of the widow and orphan were never made to him in vain, but they ever found in him a friend and a protector. His ears were always open to their appeal for help, and with purse in hand he was ever ready to minister to their necessities, and to guide them over the rough and rugged paths of life.

The impress of his noble, generous heart was ever visible in his open hand, and his many deeds of charity will long be remembered.

But he is gone. He has laid aside the staff, the sword and the ermine, and in exchange for these he has gained his crown. He has fought manfully his way, and valiantly has he run his course, and the Almighty, who is a strong tower of defense to all who put their trust in Him, is now his strength and his salvation.

Yes, he has gone. Standing erect in all the pride and strength of manhood, the angel of death received the fatal mandate and struck him from the roll of human existence. Ere this his appearance has been entered before the high court of Heaven. The judgment of a blameless, a useful, and a Christian life has been pronounced by his friends here below, and the Supreme Judge of that high court, upon an examination of the transcript of his record, will find no error in that judgment, and the same will be IN ALL THINGS AFFIRMED.

Hon. W. S. Delaney, of the Commission of Appeals, delivered the following response:

Gentlemen:—On the part of my brethren of the Commission of Appeals, and at their request, I join you in your expressions of love and reverence for the memory of the deceased. Well may we speak of him tenderly as our departed brother. For from the earliest ages of the common law our profession—composed of bench and bar—has constituted one great brotherhood. And doubtless this very feeling of fraternity, this professional kindredship, extending through so many ages, conse-

crated by so many lofty traditions, and embracing so many eminent men, whose characters have furnished the noblest models for imitation, has done much to elevate and purify the profession. No lawyer worthy of his vocation can look back on the long line of illustrious names that have done honor to his profession without a strong desire, and perhaps a trembling hope, that he too may be found not wholly unworthy of that august companionship. This feeling, not exactly hereditary, yet bears a strong resemblance to the hereditary sentiment.

To the well born youth no incentive to virtue and to high achievements could be stronger than to feel that in his own veins flows the blood of illustrious men, who from their tombs implore him by all sacred memories of the past, and by all the obligations of filial duty, not to be unworthy of the name he bears.

We admit that this sentiment, both professional and personal, may run to excess; that the haughtiness which it sometimes engenders, not only may, but often does, survive without the slightest merit to make it respectable. But this is only speaking, in another form, an universal truth—that our highest virtues are closely allied to kindred vices. Nay, the Roman poet has declared, with rare felicity of expression, that the excess even of virtue itself is a species of vice. It is nevertheless true that many of the greatest men who have ever lived, though models themselves of moderation and simplicity, have been strongly animated by this sentiment. An inspiration something like this, and a strong desire to be found worthy of their high calling, has no doubt exerted a permanent and salutary influence in our profession.

And if it be true, as has sometimes been said, that lawyers have wielded greater power than that which kings possess, I trust it is also true, that they have often used that power more wisely, and far more humanely than kings are wont to do. That they have not always been wise or just, or humane, we may also admit, but in this they only share the infirmities common to all men. A story is told of Peter the Great, that after listening to the arguments of counsel in Westminster Hall, he remarked, as he withdrew, that he had only two lawyers in Russia, and that he would hang one of them as soon as he returned home. The monarch, without intending it, paid a high tribute to the legal profession, for his arbitrary power would soon have been shaken, if a well organized bar had been permitted to question it. He had the same fear of the legal profession which Philip of Macedon had of the Athenian orators. "Deliver up your orators," said the king, "and we will make a treaty." The people replied that his proposition was the same which the wolves in the fable had made to the sheep. "Surrender your watch dogs and we will live together in peace." Thus, perhaps, we may justly persuade ourselves, that our profession, in a large measure at least, are the advocates of liberty and the guardians of good government. But if our pride should be exalted by the thought, it will be humbled when we reflect how soon the achievements of the greatest advocate or the

wisest counselor fade from the memories of men. When we look back through the reports, even a few hundred years, we find the names of advocates who must have been great and distinguished in their day. We discern traces of their skill and power. We have seen that they must have exerted a commanding influence while they lived; but who they were, what was the story of their lives, what good or ill-fortune befell them — of these things we know as little as if the men had never lived. One brief epitaph will suffice for them all: "*Magni stat nominis umbra*;" and so it will be with us, professionally as well as personally, "we are such stuff as dreams are made of, and our little life is rounded with a sleep." Yet, no good man should hesitate or falter in the work which is before him. The man may die and be forgotten, but his work will live, and the lesson of his example will remain to those who survive him. It is curious, and not uninteresting, to observe how distinguished public men have been regarded and treated in different ages and countries. The remark of Solon, that no man should be accounted happy until death, has generally been applied to the common lot of life; but if it were capable of this general application, it was probably like many similar remarks of great men, prompted by circumstances peculiar to his country. At all events it was singularly applicable to prominent men of his country, not only in his own age but for centuries after. For though the Athenians crowned their illustrious men with honors in their high places, yet for slight offenses and even without offense, for their misfortunes, these same men were liable to be deprived of their property, to be thrown into prison, to be driven into exile, or put to death by poison. Widely different was the character of another great people of antiquity. Just after the battle of Cannae, when the fragments of the Roman army came flying for refuge to the gates of the capitol, and panic and terror spread far and wide, the senate and the magistrates went forth in a body to meet their defeated general — not to throw him into prison, not to drive him into exile, or hurl him from the Tarpean rock, but to thank him that in the midst of despondency and flight he had not dispaired of the republic. In modern times the English historians have often pointed out the superiority of England in this respect, over the nations of the continent. In our own country, it is gratifying to note that the people have not often been grossly and persistently unjust to their illustrious men. If men of merit are not always publicly rewarded, they are generally appreciated and esteemed by their fellow citizens, and perhaps in a greater degree than in any other country. The highest public honors are within the reach of all classes of the people.

The distinguished man whose death has called us together to-day, rose, as so many of his countrymen have done, by merit alone. His sterling qualities of mind and heart attracted the confidence of his fellow citizens, and secured his elevation. Elevation to high places is generally fatal to a weak or a shallow man, but in his case it only served

to bring out more clearly to view the finer traits of his character; his manly simplicity, his perfect truth, his inflexible justice, his noble disinterestedness, and, withal, that gentleness, which won the hearts of all who knew him. He did not seem to know how to do wrong, and his brethren now assembled can recall nothing in his life to regret, far less anything to deplore. Yet this man, so gentle in civil life, was suddenly transformed, at the call of duty, into a soldier of lofty courage and conspicuous presence, moving upon the field with the serene composure of a veteran. His comrades in arms will long remember his heroic conduct in the hour of peril, and at their reunions the sound of his name will bring unconscious tears to eyes that looked unawed upon all the terrors of battle. He possessed another kind of courage, too, not always possessed even by the brave. He could do justice at the risk of being censured by his friends.

There is still another trait of his character which we must not pass over in silence — his simple and unaffected piety. How beautiful, how divinely beautiful, is piety when it is real. It is like a benignant genius attending the footsteps of some favored one, beloved of Heaven — ever present, yet never seen except in its gracious influence upon his life and conduct. Those who loved Judge Winkler most, loved him all the more because he became as a little child while kneeling at the Master's feet. And now we have followed him to his final rest. We have laid our humble tribute upon his tomb. Beyond is the unknown, the unsearchable, into whose awful secret no mortal eye may look. Nothing is left of him but memory and immortal hope.

Peace to his gentle shade. In his death he has realized in a remarkable manner the aspirations of Sir William Blackstone.

“Untainted by the guilty bribe,
Uncursed amidst the harpy tribe;
No orphan's cry to wound my ear,
My honor and my conscience clear;
Thus may I calmly meet my end,
Thus to the grave in peace descend.”

COURT OF APPEALS OF TEXAS.

AUSTIN TERM, 1881.

HENRY HARPER *v.* THE STATE.

1. CORROBORATION OF ACCOMPLICE TESTIMONY must be effected by the evidence other than that of the accomplice himself; the facts to be corroborated must be criminative of the defendant; and the corroborative evidence must tend to connect the defendant with the offense committed.
2. EVIDENCE.— In a trial for theft the principal witness against the defendant was one B., who had been previously tried on and acquitted of the same accusation. Over the defendant's objection, the State was allowed to introduce the record of B.'s acquittal. *Held*, error.

APPEAL from the District Court of Camp. Tried below before the Hon. B. T. ESTES.

Theft of a beef steer belonging to one Minchen was the charge against the appellant, and two years confinement in the penitentiary the punishment assessed against him.

Minchen, the alleged owner of the animal in question, proved its disappearance about the time laid in the indictment, and testified that he soon afterwards found near a certain locality a skull which he recognized by its horns to be that of his missing steer. The skull had a bullet-hole in it. About the time the steer disappeared, witness heard that one Bill Bates had carried a beef to the neighboring town of Pittsburg, and sold it there. Witness went to see Bates, and information derived from him caused the witness to immediately go to see the defendant, who lived in the neighborhood. In reply to witness's inquiry the defendant denied having anything whatever

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to do with the killing or taking of the beef, but stated that Bill Bates had come to see him the preceding night, and tried to get him to take the killing of the beef upon himself, which he refused to do; and the defendant asserted his innocence. Witness then preferred a complaint against Bates for theft of the steer, which, without witness's consent, had been taken from its accustomed range in Camp county.

Bill Bates was next introduced by the State. He testified that, about the time Minchen lost his steer, he, the witness, borrowed a wagon from one Eubanks for the purpose of hauling a load of pine to Pittsburg, for sale. Proceeding with his load of pine, he reached a point on the road near the place where Minchen afterwards found the skull, and there he stopped to fix his hame-string, which had broken. While he was thus delayed, the defendant came out of the woods with a gun, and told witness he would pay him fifty cents to carry a beef to town and sell it for him. Witness consented to do so, and threw the pine off the wagon. Defendant led the way, and witness followed with the wagon into the woods about a hundred yards from the road, and there the defendant showed him a beef which had been butchered and cut up, and was lying on the hide. They loaded the beef and hide into the bed of the wagon. Defendant put no price on the beef, but instructed witness to sell it for what he could get, and said he would meet witness on the latter's return from town. This occurred about nine o'clock in the forenoon. Witness carried the beef and hide to Pittsburg, and there sold the hind quarters and hide to Mr. Campbell, a butcher, who paid to witness one dollar in cash, and agreed to pay the balance on the succeeding Saturday. Witness left with Mr. Campbell one of the fore-quarters for sale, and sold the other to a colored woman for fifty cents in cash. On his way home the same evening, witness saw the defendant in the road,

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and paid him the \$1.50, and defendant paid fifty cents of it to witness, as they had agreed. Witness afterwards collected from Campbell the balance, and paid it to the defendant. At a subsequent day Mr. Minchen came to see witness, and got from him information as to whom he acted for in selling the beef; and that night witness went to see the defendant about the matter, and told him that Minchen had accused him, witness, and, reminding the defendant of the facts, he insisted that defendant should state them to Minchen. Defendant said that it was all right, and that he would so state to Minchen. This took place at defendant's, and there was no third person present. There was a party at defendant's that night, and it was on that occasion that witness paid over to him the balance collected from Campbell. Witness never carried any other beef to Pittsburg.

Soon after his call on the defendant, the witness ran off, or left home, and was arrested five or six miles from home by the defendant and two or three other persons, who found him squatted down in a fence-corner inside a field. He ran off because he heard that his life was threatened by the defendant and his associates, some of whom were armed when the party arrested witness.

The witness admitted that, about the time Minchen lost his steer, he went to Dr. Bates for some shot with which to kill a beef, and that Dr. Bates advised him not to kill it then; but he denied that he told Dr. Bates that he must kill the beef then because he had hired a wagon to carry it to Pittsburg, for sale.

Quincy Eubanks, for the State, corroborated Bill Bates with respect to the latter borrowing witness's wagon for the purpose of taking a load of pine to the town of Pittsburg.

W. G. Campbell, for the State, testified that he was a butcher in the town of Pittsburg about the time referred to by the preceding witnesses. He corroborated Bill

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Bates with respect to the sale of the beef-meat and hide, but added that nothing was said by Bates to indicate that he was selling for any other person than himself.

Over objection by the defense, the State was permitted to introduce as evidence the record of a judgment of the District Court of Camp county acquitting Bill Bates of the theft of the same steer as that involved in the present case. The defense reserved exceptions to the admission of this proof.

Peter Hill, for the defense, testified that soon after Bill Bates had accused the defendant with the taking of Minchen's steer, witness, defendant and others went to see him about the matter. Bates denied ever stating that defendant took the animal, and said that he killed it himself.

L. Johnson, for the defense, testified to working with defendant in the latter's field the entire day on which Bill Bates went to Pittsburg with a wagon, about the time Minchen lost his steer. Witness saw Bates on his road, and observed that there were bushes in the wagon as though there was meat in it.

Caleb Norton, for the defense, testified that he saw Bill Bates carrying beef from a wagon into the market-house in Pittsburg about the time in question. Witness asked Bill Bates whose beef that was, and the latter replied that it was his own.

Dr. J. K. Bates, for the defense, testified that, about the date referred to by previous witnesses, Bill Bates came to him to get some shot with which to kill a beef. Witness, offering to let Bill Bates have some bacon, advised him not to kill the beef at that time, as the weather was too warm. Bill replied that he wanted to kill one and take it to Pittsburg, and sell it.

No brief for the appellant.

J. H. McLeary, Attorney General, for the State.

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HURT, J. Harper, the appellant, was convicted for the theft of one beef steer, upon the evidence of one Bates alone; he, Bates, being evidently an accomplice if not the only thief in the transaction. There is not in the whole range of the evidence the most distant suspicion raised against Harper except in the testimony of Bates.

The court below seems to have acted on the assumption that if the accomplice is corroborated upon any fact, whether tending to connect the defendant with the commission of the offense or not, this would be sufficient. For instance, the accomplice Bates testified that he had borrowed a wagon to haul pine to town; that defendant came to him and hired him to take the beef to town and sell it for him; that he carried the beef in the wagon to town and sold it. The owner of the wagon and the person who purchased the beef were introduced, and by them the State proved that the wagon was borrowed by Bates; and that he said he wanted it to haul pine to town; and that the beef was sold in the quantities and to the person as stated by Bates. Thus far Bates was corroborated, and no farther. Each and every one of these facts may be true; but that either of them tends in the least degree to connect the defendant with the theft of the beef steer fails to appear.

If the accomplice testifies to a fact tending to connect the defendant with the commission of the offense, and the existence of this is sworn to by some other witness, or if a fact tending to connect the defendant with the commission of the offense is sworn to by a witness other than the accomplice, whether testified to or not by the accomplice, this would be corroborative. The strength of the corroborative facts is not now under discussion. To return to the subject of corroboration: the facts or circumstances which are the subject of corroboration must be criminative. They cannot be made so by other facts sworn to by the accomplice; they must be so inherently.

Syllabus.

The accomplice may be corroborated upon any number of facts, but unless the fact or facts thus corroborated be criminative,—tend to connect the defendant with the commission of the offense,—such corroboration is spurious, worthless, and in fact no corroboration.

The evidence of the State, as well as that of the defendant, tended very strongly if not conclusively to fasten guilt upon Bates, not as an accomplice merely but as the sole guilty agent and the thief. The State, over objections of the defendant, introduced the record of the trial and acquittal of Bates upon the charge of the theft of the same beef steer. This was clearly wrong. Defendant was no party to that suit or prosecution. This evidence was simply the opinion of the jury. What evidence was before them is not shown, nor indeed would this matter. Under no rule of evidence would this be evidence under the state of case presented by the record.

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

HENRY FRICKE *v.* THE STATE.

APPEAL — NEW TRIAL — JURISDICTION.— On being convicted of misdemeanor the defendant moved for a new trial, and on the overruling of that motion gave notice of appeal and entered into recognizance therefor. On the next day he filed another motion for a new trial, which the county attorney moved the court to dismiss because the defendant's appeal had been perfected. The trial court allowed the defendant to dismiss his appeal, and granted him a new trial; but the county attorney sends a transcript to this court on the ground that the award of a new trial by the court below was a nullity. Held, that the action of the court below was not beyond its jurisdiction while its term lasted, nor was there error in the award of a new trial.

Opinion of the court.

APPEAL from the County Court of Guadalupe. Tried below before the Hon. W. P. H. DOUGLASS, County Judge.

The prosecution was for maliciously killing a mule belonging to one Fritz.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Judgment of conviction was rendered on June 9th, and the first motion for a new trial was filed and overruled the same day. The defendant excepted, gave notice of appeal, and entered into a recognizance. On the 10th of June, the defendant filed another motion for a new trial. The county attorney moved the court to dismiss this second motion for new trial, because the court had no jurisdiction of the case,—the defendant having perfected his appeal. There was no action of the court had upon this motion of the county attorney; but, on the 11th of June, the court granted the defendant a new trial,—he dismissing his appeal. The county attorney had a transcript prepared, and brings the cause to this court, and asks an affirmance of the judgment.

The second motion was filed in time; and if it had not been, the court, being satisfied that injustice had been done the defendant, certainly had the right to correct the error, upon his request and during the term, by granting him a new trial.

If this court were to affirm the judgment, we are of opinion that on the return of the mandate to the court below there would be some trouble attending the issuance of an execution, there being no judgment for its basis. This appeal is dismissed.

Ordered accordingly.

Statement of the case.

R. G. ATKINS *v.* THE STATE.

1. AGGRAVATED ASSAULT.—To constitute an assault and battery the injury must be intentionally inflicted; but when injury is inflicted by violence the intent to injure is presumed, and it devolves upon the defense to repel the presumption by countervailing proof. The intended injury may be bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind. Manipulation of a woman without her consent, in order to obtain sexual knowledge of her person, may superinduce such emotions without inflicting bodily pain.
2. PRACTICE IN THE COURT OF APPEALS.—This court presumes the competency of a trial judge to control the argument of counsel, and does not revise his rulings in doing so unless it is made apparent that they were in violation of law or an abuse of his judicial discretion to the prejudice of the appellant.
3. CONTINUANCE.—DILIGENCE is not shown by merely alleging a timely procurement of process for the absent witness. A proper disposition of the process must also be alleged.
4. NEW TRIAL.—A new trial should not be granted in order to enable the defense to obtain testimony to impeach the evidence of the prosecuting witness; and it is immaterial, it seems, that such testimony is newly-discovered.
5. FACT CASE.—See evidence held sufficient to sustain a conviction for aggravated assault and battery committed by unwarranted approaches to a woman.

APPEAL from the County Court of Dallas. Tried before the Hon. R. E. BURKE, County Judge.

The indictment charged the appellant with committing an aggravated assault and battery upon Mary Sorrells, on October 24, 1879. He was found guilty, and his punishment was assessed at a fine of \$100.

Mrs. Sorrells was the principal witness for the State. She stated that she had known the defendant for several years, and lived about half a mile from him. His wife died early in the year 1879, and in less than two months after that event he came to witness's house and made "unfair proposals to her" by telling her that his wife was jealous of her and that he wanted pay for his trouble

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with his wife. Witness told him that his wife was dead and not to talk about what she had done. Witness resisted his proposals and he went off. The witness had been a married woman for some twenty years, and had a daughter eighteen years old. Defendant had taught school in the neighborhood, and witness's children had gone to school to him. His family and witness had been intimate. Shortly after his visit already mentioned, the defendant came again to witness's house, and told her he had a secret to tell her. She asked him what it was, and he replied that he feared that witness's husband was getting jealous of him. Witness denied that such was the fact, and defendant again told her that he wanted her to be his wife for a while. Witness refused, and he apologized to her and went away. On several subsequent occasions the defendant repeated these proposals to the witness, but was refused. In the evening of October 24, 1879, the witness and her son, aged eleven, being the only persons at home, the defendant came and asked her if a shirt he had left her to wash was ready for him. Witness told him it was not ironed, but would soon be, and for him to come back by there. He went off and returned after night. Witness's little son was asleep, and defendant then told her that "he had come for it, and meant to do with her like her husband does." "He tried to kiss me and I wouldn't let him; told him he shouldn't slobber on me. He took hold of my hand, and I jerked away from him and told him to go away. I gave him his shirt; I think I threw it at him. I did not wake my eleven-year-old son; neither did I leave the house to notify any one."

The witness further stated that as soon as her daughter came home she told her of the defendant's conduct, but did not inform her husband until some time afterwards, and then apprised him of it by degrees, as she was afraid of a difficulty between him and the defendant. When the defendant came after the shirt, he said he was going

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to preach the next day, which was Sunday, and wanted the shirt to wear on the occasion. Witness denied that she told Mrs. Virginia Vessels, after October 24, 1879, that the defendant was a perfect gentleman and had always treated witness well, and that she intended to quilt a quilt for him without charge, nor that she intended to go over and spend a day with him, as he looked so lonesome. She may have said, prior to said date, that she would quilt a quilt for him. She never received two half-dollars from defendant, but may have accepted a small piece of cinnamon bark from him. She never told defendant that if her husband got jealous of them she would let him know. She received one or two letters from defendant, but never told him that she carried them in her shoe until she could get a chance to read them. She destroyed them after reading them, but did not show them to her husband nor tell him that she got them. Witness had always thought that it was man's place to propose, but that it was a woman's privilege to refuse.

Mrs. Sorrells identified as defendant's handwriting a letter dated August 19, 1880, and addressed to her husband and herself. This letter was introduced in evidence by the prosecution and occupies several pages of the record. Commencing with a complaint of persecution and slander, a few excerpts will sufficiently exhibit its tone and purport:

"Mary," protests the writer, "nothing but an immediate revelation from God himself would have made me believe you would have persecuted me and sworn the hard things you have against me. Do you for one moment think you can under the circumstances escape the malediction of Heaven or the vindictive wrath and punishment of Almighty God? If you answer in the affirmative, let me warn you as one who has suffered all the persecutions, slanders and misrepresentations that his

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Satanic Majesty could heap upon me, through and by his active subordinates, that if you persist in your course towards me you will have to take up your abode with devils in Hell, there doomed to hear the clanking of chains and serbean peals, and the hideous outcry of hell-hounds' never-ceasing bark. . . . You know you told me, and whispered to me, and said that if Miss —— did not come to stay with you that I might come, and I said in a joke, 'I wish Miss —— was dead.' You told me afterwards Bettie heard me, and you told her it was some of my nonsense. . . Remember you told me if John got jealous of us you would let me know. Remember the apples, cinnamon bark, candy, and letters you got from me. You told me you put my letters in your shoe until a convenient time to read and then burn them. These questions and hundreds of others, you will remember, will be put to you in open court. My lawyer said he would tell it all on you. Where is the dollar I gave you? I have no idea you ever told Jack I gave you two half-dollars. If you appear against me in court I will sue you for one dollar, and make affidavit how I come to give you the dollar and why I gave it to you; but if you do not appear against me I will say no more about it."

Mr. Ard, for the State, testified that the defendant, in November, 1879, and in the presence of some twenty-five or forty members of his church, stated that, on the preceding 24th of October, he was at Mrs. Sorrell's house; that he took hold of her arm and tried to feel of her pulse because he thought her pulse was too quick; that he tried to kiss her, but she refused and said she didn't want to be slobbered on; and that he then got mad and told her he had a notion to stamp the —— out of her.

This was all the evidence adduced at the trial. As before stated, the jury found a verdict of guilty, and assessed a fine of \$100 against the appellant. He moved for a new trial, and as one of the reasons therefor

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assigned the overruling of his application for a continuance. The application was based on the absence of Mrs. Vessels, by whom he expected to contradict certain portions of the testimony of Mrs. Sorrells, the prosecuting witness. The affidavit of Mrs. Vessels was filed in support of the motion. It stated that Mrs. Sorrells, subsequent to the date of the alleged assault, told the affiant that the defendant was a perfect gentleman, and that she, Mrs. Sorrells, had always been well treated by him; that she would quilt a quilt for him, free of charge, and would go to his house and spend a day with him, as she knew he was lonesome. The motion for a new trial was overruled, and the defense excepted. All other matters are disclosed in the opinion of this court.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The indictment charges that on October 24, 1879, in Dallas county, the accused "did unlawfully make an aggravated assault and battery upon the person of one Mary Sorrells, and did then and there assault, strike, restrain, illtreat, ill-use, and in violence lay his hands upon her the said Mary Sorrells, she the said Mary Sorrells being then and there a female person, and he the said Atkins being then and there an adult male person, contrary," etc.

The case being transferred from the District Court, where the indictment was found, to the County Court, for trial, the accused applied for a continuance, alleging that he could not go to trial for the want of the testimony of one Mrs. Virginia Vessels. The application for a continuance was overruled, and the defendant took his bill of exceptions to the ruling of the court. The defendant was tried and convicted, a jury having returned a verdict

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finding the defendant guilty, and assessing his punishment at a fine of one hundred dollars, upon which judgment was rendered. The defendant's counsel moved the court to grant him a new trial on the grounds following: "Because, 1st, the verdict of the jury is contrary to the law and the evidence; 2, because the court erred in its charge to the jury, wherein they were told that any indecent familiarity with the person of a female, or defendant Mary Sorrells, she experienced feelings of constraint, a sense of shame, or any other disagreeable emotion of the mind whatever, then he would be guilty under the law of an aggravated assault and battery, and you should so say by your verdict; 3, because the court erred in permitting the counsel for the State, to wit, A. W. Nowlin, a private prosecutor, and the county attorney, to go outside of the record and discuss the private character of defendant; that the court, over the objection of defendant, allowed counsel for the State in the conclusion to discuss defendant's church relations, to wit, that he was a minister of the gospel, and that the prosecuting witness, Mary Sorrells, was a sister in his church; to discuss, without proof, that one of defendant's counsel was a green-backer and a candidate for congress on that ticket, when there was no proof before the jury of any of these facts, and the court refused then and there to permit counsel for defendant to reply to these arguments made outside the record; and, 4, because the court erred in overruling defendant's application for a continuance or postponement of this case." In an amended motion, made by leave of the court, an affidavit of the witness Virginia Vessels, on account of whose absence a continuance was asked in the first instance, is appended to and made part of the motion for a new trial. This motion was overruled and a new trial refused.

Bills of exception were reserved, 1, to the overruling of the application for a continuance; 2, to the charge of the court as set out in the motion for a new trial; and, 3,

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to the refusal of the court to grant a new trial. The errors assigned are substantially the same as those mentioned in the several bills of exception, and may be conveniently considered as presented in the bills of exception, in connection with the several grounds set out in the motion for a new trial.

Whether the first ground of the motion for a new trial is tenable or not depends upon whether there is any error specified in any of the other grounds set out in the motion, save the question of the sufficiency of the evidence to support the verdict. With reference to the second ground of the motion, embraced in the second bill of exceptions, it may not be amiss to state that the charge of the court is not correctly stated in the motion for a new trial. The charge excepted to, as set out in the motion for a new trial, omits to state that the improper liberties taken with the injured female were against her will and consent; which, if true in fact, would amount to this, that any indecent familiarity with the person of a female which produced a sense of shame or other disagreeable emotion of the mind would constitute an aggravated assault and battery; whereas the law only makes these causes actionable in this character of cases when the violent or indecent familiarity with the person of a female is against her will. *Pefferling v. State*, 40 Texas, 486; *Curry v. State*, 4 Texas Ct. App. 574; *Ridout v. State*, 6 Texas Ct. App. 249; *Veal v. State*, 8 Texas Ct. App. 474; Clark's Crim. L. note 72, § 5, pp. 164-5.

By comparing the charge as given by the court with that complained of in the motion for a new trial, it will be apparent, not only that the latter is stated inaccurately, but also that the charge as given contained in fact what it would have been a material defect to omit. The charge given is to the effect that if the jury "find and believe from the evidence before you that the defendant used any indecent familiarity with the person of Mary Sorrells, without her consent, and by means of said indecent familiar-

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ity she experienced feelings of constraint, a sense of shame," etc., he would be guilty. The injury done must be intentionally inflicted; but when injury is inflicted by violence, the law presumes the intent, and it rests with the person who inflicted the injury to show the innocence of the intention; and the injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. Penal Code, art. 485. We are of opinion that the charge of the court was sufficiently explicit under the proofs adduced to inform the jury that if these indecent familiarities, embracing the language and conduct of the defendant, and the taking hold of the person of the female, were against her will and consent, and the jury so believed, then these acts thus done would constitute an aggravated assault and battery. The act of violence seems to have been proved, and the law, as before stated, presumes that the intent was to injure, and there seems not to have been any attempt on the part of the defendant to show any other intention on his part than to have carnal knowledge of her person, and in his efforts to attain that object his language and conduct were of a character well calculated to inspire any virtuous female with disagreeable emotions of the mind.

The third ground of the motion for a new trial, based on the idea that the State's counsel, in the conclusion, was permitted to travel out of the record and discuss matters not in evidence, and that counsel for the defendant was not allowed to reply thereto, is not so presented by the record before us that we can determine understandingly whether the matter complained of was of a character calculated to injure the rights of the defendant and militate against a fair trial, or not. It may have been in response to some position previously taken by the defendant's counsel, or a mere harmless pleasantry, for aught that appears from the record before us. If injury resulted to the defendant by the course pursued by counsel representing the prosecution, or in the court's refusing

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to allow a reply thereto, this should have been presented by bill of exceptions or in some other tangible form, so as to enable this court to inquire into it understandingly. But even if this had been done, and it should have appeared that the subject was trivial, and that the conduct of the proceedings was not beyond what the court might well have permitted in the exercise of a proper judicial discretion, even then this court would not interfere, unless it had been further made to appear that the rights of the defendant to a fair and impartial trial according to the prescribed forms of law had been violated. The trial judges, we must presume, are competent to direct a trial before them, and under the law to control the argument of counsel, and we have never been inclined to revise this kind of action or to revise this character of rulings unless it is made apparent to us that the rules of law have been violated, or that the discretion confided by law to the judges had been abused, and abused to the prejudice of the defendant.

We must be permitted in this connection to remark with reference to the assumption complained of to the effect that the State's counsel was permitted to discuss the church relations of the parties, that, whilst we are of opinion the argument might well have been omitted, we find that the case is not without evidence tending at least to the effect that the defendant was a minister of the gospel. The prosecuting witness testified that the defendant, when he came after a shirt, which seems to have been on or about the date mentioned in the indictment, "said he was going to preach the next day, which was Sunday, and he wanted the shirt to wear on the occasion."

The defendant before the trial applied for a continuance, stating the name and residence of an absent female witness, and what it was expected he would be able to prove by her; and in the motion for a new trial he offered the affidavit of the witness as to what she would testify

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in the case. The diligence employed in order to secure the attendance of the absent witness is set out in the application for a continuance; a subpoena had been issued on August 25, 1880, and served September 2, 1880, and on September 6, 1880, an attachment was issued. The indictment was filed at the December term, 1879, and was transferred to the County Court February 11, 1880. The application for continuance was filed and overruled on September 9, 1880, three days after the issuance of attachment for the witness. The object of the testimony of the absent witness seems to have been a preparation to impeach the testimony of the prosecuting witness. The application for a continuance states that an attachment had issued for the absent witness, which had not been served. It is not stated that any effort was made to serve the attachment, nor even that it was placed in the hands of an officer for service. This is not such diligence as the law demands. It is not sufficient to state merely that the process was sued out; but it must be shown what was done with it. See cases cited in note 186 to page 471, art. 1386, Clark's Crim. Law. The court did not err in overruling the application for a continuance. A postponement for the time was not asked for; on the contrary, the application states that "there is no reasonable expectation that the attendance of the witness can be secured to the present term of the court by a postponement of the case to a future day of the term."

It seems that counsel for the defendant, by embracing in the motion for a new trial the overruling of the application for a continuance and then appending the affidavit of the witness, took the view that the court should have granted a new trial under the *proviso* to art. 518, Code Crim. Proc., clause 6, to this effect: "*Provided*, that, should an application for a continuance be overruled and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses was of a mate-

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rial character, and that the facts set forth in said application were probably true, a new trial should be granted." To our minds the question here presented is this: should the court have granted a new trial in order to enable the defendant to procure the attendance of a witness solely for the purpose of impeaching the testimony of a witness for the prosecution?

In the present case it is not pretended that the testimony of the witness was newly discovered; but if such had been the case, even then a new trial should not have been granted solely for the purpose of impeaching a witness. The defendant must have known the general features of the case and what would necessarily be litigated. He must have known the charge against him which would have to be maintained by proof. *Williams v. State*, 7 Texas Ct. App. 163, and cases collated in § 6, note 230, Clark's Crim. L. p. 571.

Did the evidence support a verdict of guilty? It is true there are some peculiar features in the testimony of the prosecuting witness. She was evidently subjected to a very rigid cross-examination. Still her testimony did not stand alone entirely; and however this may be, while she appears to have been a woman occupying an humble sphere in society, still the jury gave credence to her statements, and mainly upon them found the defendant guilty, and the court below must necessarily have believed that her statements were true, else he would have set the verdict aside and granted the defendant a new trial. In our opinion there is sufficient testimony to support the finding of the jury. After a careful examination of the whole case, we find no such error committed on the trial below as would warrant a reversal of the judgment, and it is affirmed.

Affirmed.

HURT, J., did not sit in this case.

COURT OF APPEALS OF TEXAS.

TYLER TERM, 1881.

JIM COOK *v.* THE STATE.

1. CARRYING WEAPONS.—At a trial for unlawfully carrying a pistol there was evidence tending to prove that the cylinder of the pistol was not attached to it nor in the defendant's possession when the State's witness saw him with the weapon. *Held*, that the trial court erred in refusing a special instruction for acquittal in case the jury so found the facts.
2. PRACTICE.—After the prosecuting counsel had concluded his opening argument to the jury, the defense offered a material witness who had not been summoned but had promised to attend. No dilatory purpose or other malpractice was imputable to the defense. *Held*, that article 661 of the Code of Procedure made it incumbent on the trial court to admit the evidence, and it was error to exclude it.

APPEAL from the County Court of McLennan. Tried below before the Hon. G. B. GERALD, County Judge.

The material facts are disclosed by the opinion of the court.

T. A. Blair, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was convicted of unlawfully carrying a pistol. The record presents two questions for our decision: 1st. Is it unlawful to carry a pistol which has no cylinder? 2d. Did the court err in refusing to allow the defendant to introduce the witness Harman?

We are of the opinion that without a cylinder the other facts which enter into the make-up of a pistol are not

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sufficient to constitute the weapon prohibited. We are not to be understood as holding that the pistol must be in shooting order, nor that a person would *not* violate the law by carrying the cylinder and the other part of the pistol, with the cylinder detached. The rapidity with which the parts may be detached and replaced in their proper relations, the one to the other, would render detection and punishment very uncertain. The extent of our ruling upon this point is that to carry the part of the pistol without the cylinder is no offense. If we are correct on this point, it follows, there being evidence tending to prove that the defendant carried the pistol (so termed, without a cylinder, it being in possession of a third party), that the court erred in refusing to give the charge asked by the defendant.

The refused charge is to the effect that if the jury believed that the pistol had no cylinder they would acquit. It is claimed by the Assistant Attorney General that the evidence fails to show that the pistol without the cylinder was the same seen by the prosecuting witness. There was evidence tending to prove identity; whether with great or little strength is not the question. The jury being the sole judges of the weight of evidence, the court should have charged the law applicable to every phase of case indicated by the evidence. This the learned judge was requested to do, but refused, and the defendant reserved his bill.

The other question raised by bill of exception is as to the correctness of the action of the court in refusing to allow defendant to introduce the witness Harman. It appears by the bill that the evidence had closed, and that the county attorney had concluded his opening argument to the jury, when the defendant offered the witness Harman by whom he proposed to prove "that about 9 o'clock on the morning of the 7th of January, 1881, the date of the offense charged, he, the said Harman, was clerking for

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one Robertson in Waco, and that at the time above set out the defendant came into the store and showed him a pistol, and witness asked him what he intended to do with the pistol. Defendant said: 'Nothing, I have just got it from Archie Scott, and was taking it home.' Witness then said that he took the cylinder out, and put it in his pocket, and gave to defendant the pistol without the cylinder, and witness says this was on the 7th of January, 1881, about 9 o'clock, and that he has the cylinder of the pistol in his pocket, and has had it ever since." We are not informed of the ground of the objection to this proof, unless it is contained in the admission of the defendant "that the witness Harman had not been subpoenaed,—he promised him to come without;" and that the argument had begun. If the fact that the pistol had no cylinder constituted a good defense to the charge, it follows that the offered evidence was relevant and pertinent to this defense. Article 661, Code of Criminal Procedure, provides that the court *shall* allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice. The record shows that the witness had promised to attend without subpoena and testify. There is nothing in the record to show a disposition on the part of the defendant to delay the proceedings or trifle with the court. This being the case, did a due administration of justice require reception of the proffered evidence? We think so.

For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Statement of the case.

T. HUDDLESTON *v.* THE STATE.

VARIANCE—CHARGE OF THE COURT.—Appellant was tried for the theft of a receipt for money executed by himself, but which, as set out in the indictment, did not state from whom the money was received. The State offered in evidence a corresponding receipt, except that it contained a clause stating that the money was received from the alleged owner. The defense objected on the ground of variance, which the State proposed to obviate by proof that the variance was caused by an alteration of the receipt since it was taken by the defendant. The trial court overruled the objection and admitted the receipt, on the ground that the question of alteration was one for the jury. The evidence respecting the alteration was conflicting. *Held* that, though a question of variance arising on a written instrument is ordinarily one of law and for the decision of the court, it was not error, under the circumstances, to admit in evidence the receipt produced by the State, in connection with the proof of its alteration. But *held further*, that the charge to the jury should have submitted to them the issue of fact thus raised, and it was error to refuse a requested instruction properly presenting it.

APPEAL from the District Court of Travis. Tried below before the Hon. E. B. TURNER.

The indictment charged that the appellant, on the 10th of March, 1877, stole, took and carried away from the possession of J. W. Whitt a "certain receipt for money in figures and words as follows: 'Received, February 13, 1874, three hundred dollars specie. Thomas Huddleston;'" which was alleged to be of the value of \$300, and the property of said Whitt. The cause came to trial in June, 1879, and resulted in the conviction of the appellant for theft of property worth less than twenty dollars, and the assessment of his punishment at confinement in the county jail for one day, and a fine of \$500.

The facts affecting the contested issue in this case are clearly indicated in the opinion of the court. The testimony was conflicting, and was elicited from numerous witnesses examined by the prosecution and the defense.

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Their evidence in detail is not necessary to an elucidation of the ruling. The receipt was exhibited by Whitt to the defendant at the latter's request, for the expressed purpose of examination. Having got it in hand, the defendant retained it against the consent of Whitt, on the claim that Whitt had not paid the money and was not entitled to the receipt. This claim of the defendant and the alteration of the instrument presented the issues of fact contested before the jury. Whitt testified that the receipt was written and signed by a son of the defendant, by direction of the latter, and that it represented a payment of \$300, paid by Whitt in the defendant's presence on a note which the defendant held on Whitt. Defendant put his character in issue, and a number of witnesses testified that it was good.

A. W. Terrell, and Sheeks & Sneed, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The first question presented by the record and discussed by counsel is whether there was a material variance between the written instrument alleged to have been stolen, as described in the indictment, and that offered in evidence on the trial. The instrument is described in the indictment as "one certain receipt for money in figures as follows." It is then set out in the indictment, in what purports to be its exact language, as follows, to wit: "Received, February 13, 1874, three hundred dollars, specie. Thomas Huddleston." The instrument admitted in evidence, over objection by counsel for the defendant, as set out in the statement of facts, is thus described: "Received, February 13, 1874, three hundred dollars in specie of J. W. Whitt. Thomas Huddleston." And it is thus described in the bill of exceptions reserved to the action of the court admitting it in evidence: "Received, February 13, 1874, three hundred dollars, specie,

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of J. W. Whitt. Thomas Huddleston." The variance insisted on by the appellant's counsel is that the words "of J. W. Whitt" are not found in the instrument as described in the indictment; whereas in the instrument offered in evidence these words, "of J. W. Whitt," are found between the body of the receipt and the purported signature of Thomas Huddleston.

It should be noticed that the judge who presided at the trial, in signing the bill of exceptions to his ruling, appends the following brief statement showing the grounds upon which the ruling was based, to wit: "The court adds, as to the question of whether altered, or not, was a question of fact for the jury, nor did the alleged alteration affect the instrument." It may not be amiss to say in this connection that the testimony all tends to show that the receipt as at first written, and whilst it was in the possession of the person from whom it is alleged to have been taken, did not contain the words "of J. W. Whitt," and tends strongly to show that it was altered while in Whitt's possession. Yet if the question of its alteration was one of fact for the jury, we fail to find in the record before us any instruction submitting that question to the consideration of the jury. Whether such alteration affected the validity of the instrument, as affecting the question of variance, was a different question from that as to whether such an alteration would so affect the validity of the instrument as to constitute the alteration a forgery, or so as to change the pecuniary rights of the parties.

As to the question of variance, if this is to be determined alone from the face of the receipt as set out in the indictment, and that offered in evidence as shown by the statement of facts and the bill of exceptions, we would be compelled to hold that the two are not the same instrument, and that there was a material variance between the one introduced in evidence and the one de-

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scribed, and, purporting to be copied, set out *in hæc verba* in the indictment. Inasmuch, however, as there seems to have been some controversy at the trial as to whether the alteration (which is apparent) was made prior or subsequent to the alleged theft, it was perhaps well enough, as upon the whole case, for the court to have submitted that question to the determination of the jury by a pertinent charge on the subject. This seems to have been an important inquiry on the trial, as is seen from the testimony adduced. Whilst we are of opinion that whether there was a variance or not was a question of law to be ordinarily determined by the court, yet, inasmuch as there was a question as to whether the receipt had been altered before or after the alleged theft, the court erred in refusing under the circumstances to give the fourth instruction to the jury asked by the defendant, as pertinent to the issue they raised, or some appropriate charge on the subject.

The court should have awarded the defendant a new trial on the fifth and sixth grounds of the motion for a new trial.

We are of opinion that, having admitted the receipt in evidence, it was error to refuse the instructions requested by the defendant's counsel with reference to the alteration of the receipt. The court erred in overruling the defendant's motion for a new trial, upon the evidence. For these errors the judgment will be reversed and the case remanded.

Questions not discussed in the opinion have not been decided.

Reversed and remanded.

Opinion of the court.

T. M. ROBERTS AND ANOTHER *v.* THE STATE.

1. BAIL BOND.— A legal instrument is not invalidated by the omission of a word essential to its validity if the omitted word be clearly indicated by the context.
2. SAME.— A bail bond was conditioned for the payment of “\$500 five hundred ———,” and its validity is contested on the ground that it expresses no sum of money. But *held* that the dollar-mark and figures sufficiently express the amount.

ERROR from the District Court of Travis. Tried below before JOHN W. ROBERTSON, Esq., Special Judge.

The opinion shows the material facts.

John Dowell, for the plaintiffs in error.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. This writ of error is prosecuted from a judgment final by default rendered upon a forfeited bail bond. It is contended that the bond is an absolute nullity and void, and imposed no pecuniary obligation whatsoever, because in writing the amount for which the obligors were to become bound there is an omission of the word “dollars,” and that consequently no sum of money was expressed. The portion of the bond embraced in the point made is in the following words and figures, viz.:

“STATE OF TEXAS, County of Falls.

“I, Thomas M. Childers, as principal, and I, F. M. Roberts, and I, F. M. Childers and Edmund Pierson, as sureties, hold ourselves firmly bound to the State of Texas in the full and just sum of \$500, five hundred ——— to be paid in good and lawful money,” etc.

It seems to be a rule founded in reason and law that the omission of an essential word, when clearly pointed out by the context, does not vitiate an instrument. *De*

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Soto v. Dickson, 34 Miss. 150; *Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11. In the case before us if the written words "*five hundred*" had been omitted, as well as the word *dollars*, we think the bond would still have been good for five hundred dollars, for that sum or amount is clearly expressed by the figures 500 and the dollar mark affixed, which also preceded the written words, as we have seen, in the body of the instrument. *Corgan v. Frew*, 39 Ill. 31; *Petty v. Fleischel*, 31 Texas, 169; Daniel on Nego. Insts. § 86.

There is no other question raised in the assignment of errors or brief of counsel which we feel called upon to discuss, since they have been decided heretofore in this State and decided adversely to the positions contended for. We see no error in the record, and the judgment is affirmed.

Affirmed.

A. L. CARMICHAEL v. THE STATE.

CARRYING WEAPONS.—Though not technically a peace-officer or a policeman, a sergeant or under-officer in the penitentiary service is, while in charge of a convict camp and engaged in duties incidental thereto, a "civil officer engaged in the discharge of official duty," within the meaning of article 319 of the Penal Code, and as such is expressly exempt from amenability for carrying a pistol.

APPEAL from the County Court of Gregg. Tried below before the Hon. L. G. JACKSON, County Judge.

The opinion states the case. A fine of \$25 was the punishment assessed against the appellant in the court below.

Felix McCord, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Syllabus.

WHITE, P. J. This is an appeal from a judgment of conviction in the County Court for unlawfully carrying a pistol. In our opinion the evidence fails to support the judgment. Appellant was a regularly appointed "under-officer" or sergeant of Messrs. Cunningham & Ellis, lessees of the State penitentiary, and as such, at the time of the alleged offense, was in charge of a convict camp in the immediate vicinity of Longview when arrested for carrying the pistol. It is also shown that he had been hunting escaped convicts, and had arrested one in Longview a day or so previous to the offense charged, and that on the day of the alleged offense he had in charge two convicts with him in the town.

From the very nature of his employment he would be entitled to carry arms when actively engaged, as appellant seems to have been, in the duties incident to his office. His appointment was authorized by law [Rev. Stats. art. 3549], and though technically neither "a peace-officer" nor "policeman," he was nevertheless to all intents and purposes such "civil officer engaged in the discharge of official duty" as under the statute is expressly exempted from liability to punishment when found bearing arms upon his person. Penal Code, art. 319.

Because the evidence does not sustain the conviction, the judgment is reversed and the cause remanded.

Reversed and remanded.

EX PARTE JOHN HUTCHINGS.

1. BAIL.—PRIMA FACIE, the sum of five hundred dollars is not an unreasonable or excessive amount to require as bail upon a charge of felony. Whether excessive in fact depends largely upon the pecuniary condition of the accused. A sum which would be trivial to a wealthy man might be oppressive of a poor one.

Opinion of the court.

2. **SAME — PRACTICE IN THIS COURT.**— To authorize this court to reduce an ostensibly reasonable amount of bail fixed by the court below, the pecuniary circumstances and ability of the applicant should be shown in the record.

HABEAS CORPUS on appeal from a judgment in chambers rendered by the Hon. W. H. STEWART, Judge of the 26th Judicial District.

The opinion states the case.

Walter L. Wilson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The applicant was charged by complaint, before the recorder of the city of Galveston, with an assault with intent to murder. After an examination of the charge by that officer, an order of commitment was made by the recorder in default of bail in the sum of five hundred dollars.

Applicant applied for, and obtained from the Hon. William H. Stewart, District Judge of that district, the writ of *habeas corpus*. The object of the writ was for the purpose of reducing the bond, and not the discharge of the applicant.

The Honorable District Judge refused to reduce the bond, and remanded the applicant to the custody of the officer. From this order of the court the applicant appeals to this court.

We cannot rule that a bond in a felony case in the amount of five hundred dollars is excessive and oppressive. This depends, among other things mentioned in the Code, upon the pecuniary condition of the party. If wealthy the amount would be quite insignificant compared to a term in the penitentiary; if poor, very oppressive, if not a denial of the bail. Ordinarily in felony cases, a five hundred dollars bond is quite reasonable. The

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statement of facts being silent on this point, we will not presume that his Honor below acted harshly or oppressively towards applicant. To authorize us, the bond being reasonable under such a charge, to reduce the amount, proof of the applicant's pecuniary condition should have been made, thereby pointing out to us the wrong done to applicant by the honorable judge below.

That the applicant should have been discharged is not contended by his learned counsel. No other points are presented in the record.

There being no evidence as to the financial ability of applicant, it does not appear that the honorable judge below erred in refusing to reduce the amount of bail. The judgment is therefore affirmed.

Affirmed.

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DELPHINO, A MEXICAN, v. THE STATE.

1. CONTINUANCE — PRACTICE IN THIS COURT. — Refusal of a continuance will not be revised on appeal unless the transcript brings up a bill of exceptions duly reserved.
2. MISNOMER. — A middle name or initial is not recognized by law, nor is its omission or misrecital a matter of any legal significance, unless it appears that injury resulted therefrom to a different person than the one intended.
3. SAME — VARIANCE. — Indictment for theft alleged the stolen animals to be the property of F. A. Fater; but the proof showed that the middle initial of the owner's name was R. *Held*, not a variance, but a discrepancy of no legal significance.

APPEAL from the District Court of Guadalupe. Tried below before the Hon. EVERETT LEWIS.

A term of ten years in the penitentiary was the punishment assessed against appellant on his conviction for theft of two horses. The opinion states all necessary facts.

Opinion of the court.

Ireland & Burges, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. Three questions are raised in behalf of the appellant against the legality of the judgment of the court below:— 1, that the court erred in refusing to continue the case on the application of the defendant; 2, that the court erred in hearing proof as to the name of the owner of the property alleged to have been stolen, and 3, in the charge of the court with reference to the name of the owner of the stolen property. As to the first question presented it is sufficient to say that this court will not revise the ruling of the court below in refusing to grant a continuance unless the question is presented by a proper bill of exceptions reserved at the trial and embodied in the transcript of the record.

The two other grounds complained of may be treated together and may be briefly disposed of. It is charged in the indictment that the stolen property belonged to F. A. Fater. The prosecuting witness stated on the trial that his name is F. R. Fater, and not F. A. Fater, and that F. R. stand for Frederick Rudolph in his name. It will be seen that the whole controversy arose over the middle initial in the name of the injured party.

The law seems to be well settled in this State, however much it may conflict with modern ideas on the subject, that a middle name or initial is not known in law, and is treated as of no consequence whatever, unless it be made to appear that it has worked an injury to a different person than the one designed. *McKay v. Speak*, 8 Texas, 376; *Dixon v. State*, 2 Texas Ct. App. 531; *Dodd v. State*, id. 58; *Sullivan v. State*, 6 Texas Ct. App. 319.

So that it was wholly immaterial whether the middle name or the initial representing it was the one or the other letter or name contended for, it not being shown, or attempted to be shown, that it was calculated to work

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any injury to a different person than the one intended. It was wholly immaterial whether it was correctly stated in the indictment or proved at the trial, and any error committed on the trial, whether in admitting testimony or in charging the jury on the subject, would work no injury to the defendant, and would be no ground for reversing the judgment. And whilst it may be conceded that the language of the charge was taken from the case of *Brown v. State*, 32 Texas, 125, overruled in *Collins v. State*, 43 Texas, 577, as claimed by the defendant's counsel, it nevertheless related to the same inquiry as to what the middle initial represented.

We fail to discover that any error was committed on the trial, which is so presented as that it can be considered by this court, or which deprived the appellant of a fair trial; and finding no such error, the judgment is affirmed.

Affirmed.

JAMES HOY v. THE STATE.

1. LIMITATION — CHARGE OF THE COURT.— Though it is incumbent on the State to prove an offense not barred by limitation, yet there is no occasion to instruct the jury as to the period of limitation when nothing in the evidence raises a question whether the prosecution is barred.
2. PRACTICE.— Enforcement of the rule to sequester witnesses is largely discretionary with the trial court, and its action in that respect will be revised only when abuse of the discretion to the prejudice of the appellant is made to appear.
3. VERDICT.— Misspelling does not invalidate a verdict when no doubt obtains as to the word intended, or as to its meaning.

APPEAL from the District Court of Wood. Tried below before the Hon. JOHN C. ROBERTSON.

The indictment charged the appellant with the theft of two double-barreled shot guns, worth twenty dollars each,

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from C. C. Pegues, on January 22, 1880. The trial was had in June, 1881, and resulted in a verdict of guilty and assessment of his punishment at "2 years in the State Penitenilery."

The evidence was unusually direct and inculpatory of the appellant. In his motion for a new trial he complained that, the witnesses being under the rule, one of them who had already testified conversed about the case with others who had not testified.

L. G. Wright, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. In *Vincent v. State*, 10 Texas Ct. App. 331, it was held that whilst it was incumbent upon the State to prove an offense not barred by limitation, still, when nothing in the evidence raises a doubt as to whether the prosecution was barred, there is no occasion for instructions from the court to the jury upon the subject. This disposes of the only objection urged by appellant to the charge of the court in the case before us.

Another error complained of is that the witnesses talked to each other about the case after being placed under the rule. This objection is presented in the affidavit of defendant to the motion for new trial, as follows, viz.: "that he is informed and believes that T. J. Goodwin heard the said witnesses talking about said cause as above stated; that T. J. Goodwin is absent so that his affidavit cannot be procured." This affidavit is entirely too indefinite and uncertain, in that it does not state who informed him, nor what the witnesses said about the case. When the rule is invoked a wide discretion is vested in the presiding judge, and the exercise of this discretion will not be revised on appeal unless an abuse of it to the prejudice of the defendant is made to appear. *McMillan v. State*, 7 Texas Ct. App. 142; *Walling v. State*, 7 Texas Ct. App.

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625; *Davis v. State*, 6 Texas Ct. App. 196. As here shown, we cannot from the uncertainty and meagerness of the statement made in the affidavit say whether the court has or has not abused its discretion.

As to the verdict, the misspelling of the word "penitentiary" is upon a par with the spelling of the same word in the verdict in the case of *McMillan v. State*, 7 Texas Ct. App. 100, in which case it was held that misspelling does not vitiate a verdict when no doubt can be entertained as to the words intended or as to their meaning. See Clark's Crim. Laws of Texas, pp. 532, 533, and note.

So far as the evidence adduced on the trial is concerned, we do not hesitate to say that, if correctly reported in the statement of facts, we cannot well see how the jury could have arrived at any other conclusion than guilt, if satisfied of its truth; and of this latter they were also the sole judges.

There is no error made apparent from the record, and the judgment is affirmed.

Affirmed.

EX PARTE ED. GODFREY.

MISDEMEANOR CONVICTS.—Article 816 of the Code of Procedure enables a misdemeanor convict, by making the prescribed affidavit of insolvency, to obtain his discharge from imprisonment by working out the fine and costs adjudged against him; but a misdemeanor convict who is also detained in prison on a charge of felony cannot, by complying with the provisions of article 816, be set at liberty. The county authorities have no power to hire out a misdemeanor convict who is also in custody on an accusation of felony.

HABEAS CORPUS on appeal from a judgment rendered in chambers by the Hon. WM. T. AUSTIN, County Judge of Galveston county.

The opinion states the case.

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Walter L. Wilson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. A party, on default of payment of fine and cost, was committed to the county jail, and at the same time he was committed on default of bail in a felony case. After having been imprisoned in the county jail a sufficient length of time to entitle him to his discharge, rating his punishment at three dollars per day, he claimed his discharge, and to obtain the same sued out this writ. He gave the bond in the felony case after (not before) the expiration of the term,—the day the writ was issued,—and then claimed his discharge under the provisions of article 816 of the Code of Criminal Procedure.

To obtain relief under that article he must make oath in writing that he is unable to pay the fine and costs. When this is done he may be hired out, or be put to work at the work-house or work farm, or on public improvements of the county. Now, in case neither of these things is done, he must be discharged after having been imprisoned a sufficient length of time, at the rate of three dollars per day, to satisfy the fine and costs.

But certainly the county authorities have no right to take from jail a prisoner charged with felony, and hire him out, or place him to work, as is required by article 816. To do so would be a very great wrong, if not a felony. Suppose the prisoner were charged with capital felony; will it be insisted that he should thus in effect be discharged? The article embraces cases in which the prisoner is convicted of misdemeanor, the punishment being a pecuniary fine, and is of course controlled by the law regulating bail.

The judgment of the county judge is affirmed.

Affirmed.

Opinion of the court.

JAMES SHELTON *v.* THE STATE.

1. THEFT — EVIDENCE — DECLARATIONS AS *RES GESTÆ*.— In the trial of several defendants jointly indicted for theft, declarations of any one of them, made when the property was first found in their possession and explanatory of their possession of it, are verbal acts and *res gestæ*, and are admissible in evidence on the trial of the defendants or any one of them.
2. SAME — CASE STATED.— Appellant and one H. being jointly indicted for theft of an estray cow, the latter was tried first and was acquitted. At appellant's trial he proposed to prove by a third party that, when he and H. were first found in possession of the animal, H. claimed it as his property. This proof was excluded by the court below on the ground that H. had become a competent witness and his testimony the best evidence of the fact in question. *Held* error. The declaration of H. was *res gestæ*, and it was competent for appellant to prove it by any witness who heard it made.

APPEAL from the District Court of Lavaca. Tried below before the Hon. EVERETT LEWIS.

The indictment charged Robert Hogan, Albert Vester and the appellant with the theft of a cow, the property of an unknown owner. At the separate trial of the appellant, he was found guilty, and a term of two years in the penitentiary was assessed as his punishment. The opinion states the facts involved in the rulings.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. On the trial below the main State's witness, Seaborn Hall, made the following statement, viz.: "About the time alleged in the indictment I went out about four hundred yards from my house, where a beef was being slaughtered. I found Bob Hogan, Albert Vester and defendant there. I bought two quarters of beef from Hogan. Shelton said he wanted but a little beef. He got a small piece of beef and the hide, and

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went off with it." Counsel for defendant asked the witness to state who claimed the beef at the time the matters above stated occurred. The answer was objected to by the prosecution, and the objection was sustained by the court.

In explanation of his ruling the learned judge appends the following to the bill of exceptions reserved by defendant, viz.: "At a previous day of this term the co-defendant Hogan was put on trial and acquitted, and on said trial said witness Hall testified that said Hogan said he owned the animal. The court knew that said Hogan was competent to testify as a witness for defendant Shelton." In other words, the court rejected the testimony because it was hearsay, and because the best evidence of the facts sought would be statements from the lips of the witness Hogan himself, who, by reason of his own acquittal, was rendered competent to testify in behalf of his co-defendant.

In this we think the court erred and misconceived the true rule by which the admissibility of the evidence should have been tested. Everything said by all or any one of the confederates at the time and place when first found in possession of the beef, and before they had entirely consummated their purpose, was in contemplation of law a verbal act, and as such was *res gestæ*, which was competent to be proven on the trial of all or any one of them.

The fact that Hogan, whose admissions or declarations were sought to be proven, was himself a competent witness, did not, as seems to have been supposed by the learned judge, make him the only or even the best witness by whom they could be proven. Being verbal acts and *res gestæ*, they could be established by any one who was present and heard them. "With regard to *res gestæ*, Mr. Wharton says: 'the question is, is the evidence offered that of the event speaking through participants, or that of observers speaking about the event. In the

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first case, what was thus said can be introduced without calling those who said it; in the second case, they must be called.' Whart. Crim. Ev. § 262." *Holt v. State*, 9 Texas Ct. App. 572; *Lanham v. State*, 7 Texas Ct. App. 126.

For error in excluding the evidence offered, as above stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

D. C. WHITE *v.* THE STATE.

PRACTICE IN THE COURT OF APPEALS.—To enable this court to pass upon errors assigned upon the evidence, it is indispensable that the evidence involved in the inquiry be brought up in the record by a statement of facts or bill of exceptions. If the evidence be not thus brought up, this court can only revise the indictment and consider whether the charge of the court below correctly and sufficiently enunciated to the jury the law applicable to any state of facts germane to the indictment.

APPEAL from the District Court of Van Zandt. Tried below before the Hon. JOHN C. ROBERTSON.

The appellant was convicted capitally in the court below on an indictment which charged him with the murder of George Conquest, on February 20, 1877, by shooting him with a double-barreled shot gun. The record contains none of the evidence on which the conviction was had, but the charge of the court below indicates that robbery was the object of the crime.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The indictment in this case charged the appellant with the murder of one George Conquest, in

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Van Zandt county, on the 20th day of February, A. D. 1877. His trial, which took place on the 7th day of May, 1881, resulted in a verdict and judgment of conviction of murder in the first degree, with the penalty assessed at death.

From this judgment he has appealed to this court and presents to us a record which contains no statement of facts and not a single bill of exceptions; and the grounds upon which his motion for a new trial was based relate entirely to the sufficiency of the evidence, which not being before us, it is impossible that we can pass intelligently upon the motion. In the attitude in which we find the case, we can only pass upon the sufficiency of the indictment and the sufficiency of the charge of the court in its presentation of the law applicable to any state of facts which might arise under the indictment. These we have carefully considered, and can find no error of omission or commission in either; and with regard to the charge we have not only found it correct in its enunciation of the law, but the learned judge appears to have been unusually careful in guarding every right to which the law entitled the defendant.

It is a matter to be regretted, perhaps, that a record of the whole trial was not prepared and sent up; still, it is but fair to presume that the able counsel representing defendant must have been satisfied that a statement of the facts could have availed him nothing. Under the circumstances of the case it only remains for us, in the performance of a most solemn duty, to declare that the judgment of the court below is in all things affirmed.

Affirmed.

Statement of the case.

ROBERT FOSSETT *v.* THE STATE.

1. JURISDICTION — PRACTICE.— The District Court has no authority to transfer a felony case to the County Court; and therefore an order purporting to make such a transfer is a nullity, and does not divest the jurisdiction of the District Court. No order of the County Court to retransfer the case is requisite.
2. ILLEGAL MARKING OR BRANDING.— To constitute the offense of illegal marking or branding it is not sufficient that the accused marked or branded an animal not his own, without the consent of the owner. The intent to defraud is an essential ingredient of the offense, and must be established by evidence either affirmative or negative. It cannot be inferred from the naked fact that the accused marked or branded an animal not his own, without the owner's consent. See evidence *held* insufficient to establish the intent to defraud.

APPEAL from the District Court of Bosque. Tried below before the Hon. J. ABBOTT.

The indictment charged that the appellant, on April 20, 1880, did unlawfully mark one yearling, the same being cattle, and not being his property but the property of Ringgold Ellis, and without the consent of the said Ellis. The appellant was found guilty by the jury, and the term of two years in the penitentiary was assessed as his punishment.

A full statement of the evidence will be found in the opinion of this court. The Penal Code, article 756, makes the offense a felony by enacting that it shall be punished in the same manner as for theft of the animal; but, by inadvertence doubtless, this case was included in the order of the District Court transferring to the County Court a number of misdemeanor causes.

The Assistant Attorney General moved for a rehearing, and enforced his motion with a cogent argument on the evidence. But the motion was overruled.

J. C. Jenkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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HURT, J. The appellant Fossett was convicted of marking a certain yearling, the property of Ringgold Ellis, with intent to defraud. Two questions will be considered:

1st. Had the District Court jurisdiction of the case, having transferred it to the County Court? We think it had. The order of transfer being a nullity, it was not necessary for the County Court to make an order sending the case back to the District Court. The statute provides in misdemeanors for a transfer by the District Court to the County Court, but there is no power to transfer a felony. There being no authority for the transfer, the case was legally in the District Court.

2d. Does the evidence support the verdict? We think it proper to give the entire statement of facts, which is as follows:

Ringgold Ellis, sworn for the State, says: "I know defendant. I live four miles south of him. On the 10th day of April, 1880, I missed three of my yearlings, the one in controversy being one of the three. I saw them last on the Thursday morning before, about 9 o'clock. They were with my cattle and near my house. My yearlings failed to come up as usual, and, as I was a juror in the District Court then in session, I could not hunt them; but, the Sunday following the last day I saw them, I looked for them and could not find them. Hearing that a herd of cattle had been driven from the neighborhood of Meridian, I followed it, and overtook it near Fort Worth, and found one of my yearlings. I there got information of my other two, and came home. I learned that the defendant had a pasture, and that, together with the information received at Fort Worth, caused me to go to the defendant's pasture, where I found my two yearlings. One of them was marked, which is the one in controversy. The other was not marked. The marked yearling was white and red-spotted, was larger than com-

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mon yearlings, had been fed during winter and was fat and gentle. It was unmarked when it was driven away. The other was a red yearling. The defendant said he marked the red and white spotted yearling in his mark, and he drove it up and penned it. It was not branded. Defendant claimed it. I told the defendant to turn it out, or I would get it out before night by law. Defendant's father, who was present, told him to turn it out, and he did so. There was another yearling running near my house that had been taken for mine, but it belonged to Aaron Everett. I never gave my consent for defendant to mark my yearling. My yearling ran in Bosque county, State of Texas, and was taken from its range. Defendant did not claim the red unmarked yearling. He stated that it had jumped in the pasture."

S. M. Worley, for the State, says: "I went with Ellis to defendant's pasture, after his yearling. I know the yearling in controversy, owned its mother and milked her during the winter. The yearling was red and white spotted. I know that the one found in the defendant's pasture, marked in the defendant's mark, belonged to Ringgold Ellis. I know it well. Defendant said he marked and penned it, and claimed it was his, but at request of his father turned it out. It and the unmarked one took the road home, and I followed them to Ellis's house, and penned them. When they got in sight of home they lowed and ran home. The marked one was branded when they got home, and is there now. The unmarked yearling was red with mottled face."

Russell Seal, for defendant, says: "I know defendant and am in charge of his stock ranch in Palo Pinto county, and have been about three years. I milked the mother of the yearling in controversy last year. It was the property of the defendant. This cow and yearling were brought to this county some time in March, 1880. I assisted Sam Fossett, brother of defendant, to gather the

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cattle, but did not come with them to Bosque county. Afterwards I came to Bosque county to defendant's house, and assisted him in getting up some of his yearlings to mark and brand. I drove up the yearling in controversy and penned it, and know it was the property of defendant. The defendant was not with me at the time. We started out together, but separated on the prairie. I got back with this and other cattle before he got in. We looked for the branding iron shortly before this, and could not find it. We would have branded the yearling at the time it was marked at the pen, if we had had the branding iron. I heard about Ellis being there and taking the yearling away, and never saw the one I drove after that. Was not there when the yearling was marked nor when Ellis came after it."

Cross:

"Don't remember what time the herd came down. I don't remember when I came, or how long it was after the herd left, or before this yearling was driven up. I don't recollect how long I stayed down here, or what time I went away. Defendant and I started out to hunt together, but separated; I went near Dewey's (east), and defendant south. I don't know on what day of the week or month this was. The defendant told me where this yearling ran, and I brought it back to the pen. I don't know what time the defendant got back. He brought three or four unmarked yearlings with him. I think the defendant cut out an unmarked yearling and turned it out, but it got back in the pasture. I think one of them was red and white speckled or spotted, but I did not notice its condition as to flesh. The yearling I brought was medium sized but not fat. It was red and white speckled, and was the one brought from Palo Pinto county. I could tell a yearling that had been fed well all winter; the one I drove up had not been, but had wintered on the grass, and was in ordinary living order."

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Sam Fossett, for defendant, says: "I am a brother of the defendant, and a partner of his in stock business. I know the yearling in controversy. It belonged to defendant. I drove it to this county from Palo Pinto county. Seals assisted in gathering. I saw the yearling marked by defendant, which was afterwards taken by Ellis. It was the property of my brother. I knew it well. The branding iron was lost when this yearling was marked. There was another red yearling in the pasture, claimed by Ellis, that was not marked. It was a red mottled-faced yearling. The defendant and Seals drove up the yearling together. I was present and saw them when they drove up the yearlings. The red one was not claimed by the defendant."

Jo. Helton, for the defendant, says: "I know the defendant. I assisted him on the first Monday in April to round up and drive some cattle near Pilot Knob in this county. The defendant had a cow and yearling he said he had brought from Palo Pinto county. I saw a red yearling following us, trying to get in, and defendant said it might belong to some one over in town, and directed me to let it in. It was unmarked."

Cross:

"The yearling defendant said he brought from Palo Pinto county was marked. This was the first Monday in April, 1880. I met the defendant and Russell Seals on Thursday following, about 9 o'clock A. M., going south on Torrash road. Ellis lives south of this about three miles."

To constitute this offense the marking must be done with *intent to defraud*. The marking of the stock of another without his consent is not sufficient to the completion of the crime. The elements are:

1st. Marking the animal of another; 2d, without the consent of the owner; and, 3d, with intent to defraud.

Proof, therefore, that defendant marked the yearling of

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Ellis without his consent fails to reach the required goal. The evidence must go beyond this, and clearly show the intent to defraud. Now, can this intent be drawn from the marking without his consent, the stock of another? In theft recent possession of stolen property alone is not sufficient. The analogy holds good in this case evidently, to wit, that the marking of the stock without the consent of the owner, standing alone, is insufficient to establish the fraudulent intent. When the marking of the animal of another without his consent is proved, to establish the fraudulent intent we must look to the surrounding facts,—the facts and circumstances which hover around and give character to the act. These can never be enumerated. The facts tending to prove the fraud are negative as well as affirmative. Let us suppose that the defendant marked the yearling without the consent of Ellis, the owner, and the evidence shows that defendant has no cattle, or that he had none of this description (there being no claim that he was acting for another), or that, when found in possession of the yearling with his mark on it, he stood mute and made no claim, etc. This evidence would be of a negative character, but very strong in its tendency to show fraud. On the other hand, suppose that the defendant marked the animal in an unusual place,—that he acted in a secret and clandestine manner; or that he made contradictory or unreasonable statements in regard to the matter. These would be affirmative facts clearly evincing fraud. We are not pretending to pass upon the sufficiency of the supposed cases, but give them in illustration.

Viewing the statement of facts in this case in the light of these principles, we are of the opinion that the evidence fails to support the verdict. There is no fact in the evidence, save the fact of marking the yearling of another without his consent, either affirmative or negative, which tended in the slightest degree to prove that the defendant

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was actuated by a fraudulent or thievish intent. The animal was taken openly and penned in a public place, under an avowed claim of property. The other yearling was neither claimed nor marked. Passing strange, indeed, that the defendant should have intended the fraudulent appropriation of the one, and not the other!

We are thoroughly impressed with the belief that the contest was over the title to the property, and that, as the weight of the evidence was believed to be in favor of Ellis, the jury found against the defendant; thus hinging his guilt upon the title to the property alone. What a vast space between these premises and the conclusion thus drawn! Admit that the yearling was the property of Ellis, and that defendant marked it without his consent, guilt does not of necessity follow. The surrounding facts must carry the burden further, and clearly show fraud. This was not done, but, on the contrary, these facts, conceding the property to be that of Ellis, most clearly refute the idea of fraud.

The other points presented will not be noticed, as they will not arise again. The evidence failing to support the verdict, the court erred in refusing the defendant a new trial, and the judgment is reversed and cause remanded.

Reversed and remanded.

J. W. SHIPP v. THE STATE.

1. CHARGE OF THE COURT.— Having retired to consider of their verdict in a felony case, the jury returned into court and asked to be instructed whether they were authorized to weigh the credibility and character of witnesses. The court instructed them that they were the exclusive judges of the credibility of the witnesses and the weight of the testimony. *Held*, a correct and sufficient response to the question of the jury.

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2. PRACTICE—PRESENCE OF THE ACCUSED—WAIVER.—The Code of Procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on certain occasions, of which one is when the jury return into court for further instructions. *Held*, that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions. It is incumbent on the trial court and the prosecuting attorney, and not upon counsel for the defense, to see to the personal presence of the defendant in a felony case on all such occasions; and a waiver of that right should affirmatively appear to have been expressly and understandingly made by the defendant in person, and should not be rested on implication.

APPEAL from the District Court of Blanco. Tried below before the Hon. L. W. MOORE.

The indictment charged the appellant with the theft of a mare, the property of Jacob Felps. Being found guilty by the jury, the verdict assessed his punishment at a term of five years in the penitentiary.

The opinion discloses all matters involved in the rulings.

W. W. Martin, and *Nix & Storey*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. It is recited in the second bill of exceptions that after the jury had retired to consider of their verdict, they returned into open court in a body and through their foreman propounded to the court in writing the following interrogatory: "Have we the right to weigh the credibility and character of witnesses?" In response thereto the court gave the following instruction to the jury: "The jury are the exclusive judges of the credibility of the witnesses and the weight of the testimony." The defendant's counsel, being at the time present in court, excepted to this additional charge because it failed to respond to the interrogatory on the question of char-

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acter. 2d. It is further shown by the same bill of exceptions that, for the purpose of saving the point raised in the defendant's motion for a new trial with regard to the defendant not being present, it is stated as a fact that while these proceedings were being had the defendant was not present in court and had no notice of said proceedings, and that there was no waiver of his right to be present when said proceedings were had, unless such waiver can be inferred from the fact that defendant's counsel were present and failed to offer any objection to the proceedings on account of the defendant's absence.

The court, in giving the defendant the bill of exceptions, appends the following explanation of his rulings in the matter complained of, to wit: "Counsel for defendant having specially excepted as above stated to the charge given by the court, and failing in any manner to call the attention of the court to the absence of the defendant, and not excepting to the absence of the defendant, the court regards any other exception than the one taken as waived."

With respect to the first subject presented in this bill of exceptions, we are of opinion that the objection that the charge given to the jury was not responsive to the question asked by them is not well taken. It is not perceived that the court could well have done more than remit to the jury, without further aid, the duty of determining the weight of the testimony as well as the credibility of the witnesses. The character of the witnesses as shown by the evidence, as well as their means of information and their manner of testifying, were all before the jury, and it was their duty to render a verdict upon the whole testimony, after carefully considering the testimony of each and every witness, and giving to the statements of each the weight and credibility they deemed them justly entitled to in view of all the circumstances developed by the whole testimony. The jury are the exclusive

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judges of the facts in every criminal case. Code Crim. Proc. art. 676. It is beyond the province of the judge to discuss the facts. *Id.* art. 678. It is his duty to state plainly the law of the case. The charge given was correct and sufficiently responsive to the question propounded by the jury, agreeably to the requirements of the Code of Procedure, art. 696.

As to the second question presented we are of opinion that the court perhaps unwittingly committed an error which could have been easily prevented by the defendant's counsel, who seems to have been present in court at the time the jury came into court for additional instructions. The provisions of the Code of Criminal Procedure on the subject of the jury communicating with the court and asking further instructions, and also when the jury shall disagree as to the statements, are all definitely pointed out in articles 695, 696 and 697. In the succeeding article, 698, it is declared in plain and emphatic language that "In every case of felony the defendant shall be present in the court when any such proceeding is had as mentioned in the three next preceding articles. His counsel shall also be called. In cases of misdemeanor the defendant need not be personally present."

The right of the defendant to be present in court when the jury having charge of a case of felony return into court for additional instructions is clearly guarantied to him by law. It is true that many of the rights guarantied to a defendant by law may be waived by him. It is provided by the Code of Procedure, art. 23, that the defendant in a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury. In the case before us we are informed by the record that, though the defendant's counsel was present, the defendant was not present in court as he had a right to be under the law, as we have seen. But we are not informed by the record that the subject of a

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waiver of his right to be present in court when the additional charges were asked by the jury and given by the court was ever mentioned by the court or by the defendant, or by any one having authority to speak for him. We are of opinion further that the defendant's counsel, though present, was not obliged to see that the defendant was present, and that it could not be inferred from his silence that the defendant had waived his right to be present when the proceeding in question was being had against him. It was the duty of the court and the prosecuting attorney to see to it that the rights guarantied to him by law when his liberty is involved were guarantied to him on the trial, and that he is present in court when by law he is entitled to be present. The defendant's counsel could not waive for him the right to be present in court when a charge was being given to the jury; and hence the presence and silence of his counsel cannot be construed into a waiver by the defendant of his legal right to be personally present in court on so important an occasion. If it had been sought to bind the defendant by a waiver, the record should have shown in plain and unmistakable language that the defendant in person and in open court, his attention being specially directed thereto by the court or under its direction, formally waived his right to be present in court. His counsel could not in his absence make such waiver as would be binding on the defendant. The defendant could not be bound by an implied waiver of his legal right to be personally present, even though the subject was called to the attention of the court for the first time in the motion for a new trial.

The view we have taken of the case renders it unnecessary to consider the questions presented as to the action of the court in refusing the defendant's application for a continuance and the sufficiency of the testimony to support the verdict, as they may not arise on another trial.

For the reason that the defendant was not present in

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court when the jury came into court and received additional instructions from the court, the judgment must be reversed and the case remanded for a new trial.

Reversed and remanded.

MILES THOMPSON v. THE STATE.

1. **RAPE — EVIDENCE.**—In a trial for rape the injured female was allowed, over objection by the defense, to narrate the circumstances of an assault made by the accused upon her father-in-law, when the latter came to her rescue during her struggle with the accused. *Held*, that the evidence was *res gestæ* and germane to the accusation for which the accused was on trial.
2. **SAME.**—The same witness was further allowed, over objection, to state the fact that her father-in-law was dead at the time of the trial. *Held*, that this fact was admissible to account for the non-production of an important witness by the prosecution.
3. **CROSS-EXAMINATION.**—The extent of a cross-examination is a matter which must in practice be largely left to the discretion of the trial judge. The cross-examiner cannot, as a matter of legal right, require that the witness shall restate his testimony in chief.

APPEAL from the District Court of Austin. Tried below before the Hon. L. W. MOORE.

The indictment charged the appellant with committing a rape upon Eliza Janssen, in Austin county, on July 15, 1880. The jury found him guilty, and assessed his punishment at death.

The evidence in the case was unusually concise and conclusive. S. R. Blake, a justice of the peace, was introduced by the State, and identified a document as a statement made by the defendant before the witness in his official capacity. The statement was voluntarily made by the defendant after he had been fully warned as the statute directs. On this predicate the prosecution introduced the statement itself, as follows:

“Last Thursday night I left the house of Mr. H. Lewis

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in the Brazos bottom, to go to my brother-in-law's on Mrs. Freder's place. When I passed Mrs. Janssen's place I halloood, and Mrs. Janssen came out, and I asked her if she wanted anybody to pull fodder. She said no. I then asked her if she had anything to eat. She said no. She stood there a while and then started into the house, and before she got in I caught her and threw her down, and the old man came out with an ax. I turned the woman loose, and when I was getting up he struck me in the head with the ax. I then knocked him down with my fist. I turned round to the woman, and she jumped in the house and told me to leave, and I went off.

(Signed)

"MILES ^{his}
X THOMPSON."
mark.

The State proved that the day referred to in the above statement was the date of the offense as charged in the indictment, to wit, July 15, 1880.

Mrs. Janssen, testifying for the State, said she was a widow with six children. Between ten and eleven o'clock in the night of Thursday, July 15, 1880, the defendant came to witness's place in Austin county. Witness was in bed, but, hearing her dogs barking, she dressed and went out to the gate, thinking her brother had come for her on account of his sick family. She found, however, that it was not her brother but the defendant. He asked for something to eat, and inquired if witness wanted any one to pull fodder. Being scared and anxious to get back into the house, witness promised to get him something to eat, and started into the house. Just before reaching the house she felt a pressure on her shoulder, and at first thought it was a large dog of hers; but it was the defendant. He caught her by the throat and threw her down. She managed to get his hands from her throat long enough to enable her to scream twice. Her father-in-law, who was seventy-four years old, but strong considering his age, came out of the house and saw the defendant on top of the witness. The defendant raised up and struck

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the old man, who thereupon went away and soon returned with an ax, and struck defendant on the head a blow with the edge and another with the back of the ax. Defendant took the ax from the old man and knocked him down, and then came back to witness, with a knife in his hand, and told her to hush up or he would kill her. She had resolved to die rather than submit to the defendant's embraces, but her strength was about exhausted, and she thought of her helpless children, and on their account thought it best to submit without further struggle. She did not have strength to resist the defendant, but at no time consented to his having intercourse with her. After he came with the knife he succeeded in effecting penetration of her person, and accomplished his purpose. In her scuffle with him he made several scratches and bruises on her neck and face, and also a cut on her knee and a bruise on her hip. Witness's father-in-law had since died. After he was knocked down by the defendant he lay on the ground, bleeding and unconscious, until after the defendant had accomplished his purpose and gone away; and then he called to witness for assistance, and she got him into the house.

A brother of Mrs. Janssen testified that he lived about half a mile from her, and that, about eleven o'clock in the night of July 15, 1880, she came to his house in an excited and distressed condition. She told the witness that she had been ravished, and her face and neck were scratched and bruised.

J. Graff, for the State, testified that he was one of the party who arrested the defendant, and that when they brought the defendant near Mrs. Janssen's she exclaimed "That is the man."

C. L. Langhammer, for the State, testified that he assisted in arresting the defendant, and on the defendant's head he found a wound made by some edged instrument. In defendant's hat there was a cut which had been sewed

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up, and which precisely corresponded with the cut on his head. The hat worn by defendant when arrested was produced and identified.

This concluded the evidence for the prosecution. None was offered by the defense.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Having been convicted of rape upon one Eliza Janssen, alleged to have been committed on the night of the 15th of July, 1880, in Austin county, appellant has appealed to this court from the judgment, which affixed his punishment at death.

Two bills of exception, reserved on the trial by the defendant to rulings of the court, appear in the record. The first is as follows, viz.: "The injured party, Mrs. Janssen, was allowed, over objection of defendant, to tell the jury that the old man, her father-in-law, was knocked down by defendant,—remained on the ground bleeding and helpless,—and that after the rape had been committed called to her for assistance, and that she got him into the house,—that he is now dead. Defendant, by counsel appointed by the court, objected to this for the reason that the prisoner was on trial for the rape of Mrs. Janssen, and not for the murder or assault of the old man, her said father-in-law, and that the statement was irrelevant and improper, and calculated to greatly influence the minds of the jury against defendant to his great injury," etc.

Defendant certainly has no good ground to complain of the admission of that portion of the testimony relating to his knocking the old man down, even if it had been inadmissible, because he states the fact himself in his voluntary statement given by him at his examining trial under the formalities of the law, and which statement

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had been previously read in evidence in this trial by the prosecution. But, over and above this, the evidence as to the assault upon the old man was *res gestæ*, was part of the transaction, and as such was legitimate evidence. So far as the additional statement by the witness of the fact that her father-in-law was dead is concerned, it was admissible as it fully accounted for the non-production of this old man, who, from the other evidence adduced, would have been beyond doubt a most important witness to corroborate in a great measure the evidence of the prosecutrix. We see no error in the admission of this testimony.

With regard to the second bill of exception, the explanation of his Honor in approving the bill is entirely satisfactory and fully meets the objection urged. He says, "the witness had testified fully and in detail, over and over again, as to penetration; she complained of further examination as indelicate to her; the court then interfered and an interpreter, by request of witness, was then sworn to interpret for her, and through this interpreter testified fully again, without any limitation being imposed, as to penetration."

On cross-examination, the extent to which the witness may be interrogated must necessarily be and is in a great measure confided to the discretion of the trial judge. *Stevens v. State*, 7 Texas Ct. App. 39; *Arnold v. Nye*, 23 Mich. 287; *Wallace v. Taunton Street Railway*, 119 Mass. 91; *Comm. v. Lyden*, 113 Mass. 452; *Comm. v. Shaw*, 4 Cush. 593.

"Besides, although it may be important sometimes to ask a witness to repeat a former part of his testimony, there is no legal right to insist upon this. If there were, it would be without limit. It is evidently a matter entirely within the sound discretion of the court below, whose duty it is to take care that the public time is not needlessly consumed in mere repetitions; and the trial

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judges have an undoubted right to interpose in such matter though no objection be raised by the opposite party." *Aiken v. Stewart*, 63 Pa. St. 30. And, as seen above, there is less reason for any exception in this instance, as the learned judge allowed the witness subsequently to be examined again, without limit, through an interpreter, upon the very matters complained of. It is not easy to see what injury was done the defendant in this.

Having discussed the only questions raised in the record, it only remains for us to say that the trial, which resulted in the declaration that defendant's life should pay the forfeit for his crime, appears to have been eminently fair and impartial. That he is guilty of the heinous offense with which he was charged cannot be doubted if the evidence be believed. And the fiendish atrocity attending its perpetration may well justify the jury in imposing the highest penalty known to the law.

The judgment is in all things affirmed.

Affirmed.

M. L. MOCK v. THE STATE.

REFUSAL TO RENDER TAX-LIST.—By the literal import of article 113 of the Penal Code it is *ipso facto* a misdemeanor to refuse or neglect to make out and render the list of taxable property when called on in person by the assessor or his deputy; but article 4716 of the Revised Civil Statutes authorizes a delinquent to exculpate himself before the board of equalization, and, if he fails to do so, requires the board to return his name to the assessor on the list of delinquents presentable to the grand jury. *Held*, that the penal enactments on this subject must be construed in connection with correlative provisions of the Civil Statutes; and therefore, notwithstanding the literal import of said article 113, no criminal prosecution of such a delinquent can be maintained before he is allowed opportunity to exonerate himself before the board of equalization. See the opinion *in extenso* on this topic, and note the civil enactments collated therein.

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APPEAL from the County Court of Smith. Tried below before the Hon. C. G. WHITE, County Judge.

The deputy assessor testified that, on January 29, 1881, he called on the appellant at Troupe, in Smith county, for a list of his taxable property. Appellant refused to make out the list, and said he had got into trouble the preceding year by rendering his tax-list to a deputy assessor, and that he intended to go to Tyler, the county-site, within a few days, and would there render his tax-list to the assessor himself. The witness said that he was a legally qualified deputy. Appellant replied that he did not know him as such, and demanded some proof of his authority. Witness showed no other authority than the official books and papers he had with him.

It was admitted by the prosecution that the appellant did, on February 7, 1881, render his taxable property to the assessor at Tyler. On the 10th of the same month the county attorney filed the information on which this prosecution ensued. It was based on the affidavit of the deputy assessor who had called on defendant at Troupe. The jury found a verdict of conviction, and assessed the fine at twenty dollars.

G. W. Chilton, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The information purporting to be founded on the written affidavit of one B. F. Overton, charges "that heretofore, on the 29th day of January, A. D. 1881, in the county of Smith and State of Texas, one M. L. Mock, having been called upon in person by the said B. F. Overton, who was then and there a deputy tax assessor in and for the county of Smith, did then and there wilfully fail, refuse and neglect to make out and render a list of his taxable property owned by him on the 1st day

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of January, A. D. 1881, in said county of Smith, as required by law.”

This prosecution is based upon article 113 of the Penal Code, which, so far as this case is concerned, is as follows: “If any person shall refuse or neglect to make out and render a list of his taxable property when called upon in person by the assessor of taxes or his deputy, . . . he shall be fined in any sum not less than twenty nor more than one thousand dollars.” In *Berry v. State*, 10 Texas Ct. App. 315, this court had under consideration a case quite similar to the present, and in which it became necessary to construe the same article of the Penal Code under which this appellant is prosecuted. In that case this court held as follows: “This statute must necessarily be taken and construed in connection with article 4680 of the Revised Statutes,” and setting out its requirements so far as applicable to that case.

On the authority of *Berry's* case, and in pursuance of the well settled rule of construing statutes that, in order to determine the exact legislative intent, it is proper to consider all of the statutes in *pari materia*, we will look to all the laws in force on the subject of collecting taxes, in order that we may arrive at a proper construction and application of those portions of the penal laws by which those who neglect or fail to perform the duties required of them by the general law become amenable to criminal prosecution.

The Civil Statutes on the subject of taxation are embodied in Title XCV, Chapters 2 and 3 of the Revised Statutes, and include the articles hereafter referred to. Article 4669 requires that “All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed.” Article 4670 defines what is embraced in the term *real property* as applied to taxation, and article 4671 is intended to perform a similar

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office with regard to personal property. While article 4672 is made up mainly of definitions, article 4673 is intended to enumerate the various kinds and descriptions of property which is exempt from taxation, and includes eleven different classes. Article 4674 directs that all property shall be listed for taxation between January 1st and June 1st of each year, etc., and article 4675 prescribes the manner in which property shall be listed or rendered for taxation. Article 4676 relates to the place where property shall be rendered for taxation. Articles 4677 and 4678 relate to steamboats, railroads and the like, and prescribes how and where such property shall be rendered for taxation. Article 4679 relates to property of the taxpayer belonging to other persons, and prescribes their duties with reference to such property. Article 4680 provides as follows: "Each person required by law to list property shall make and sign a statement, verified by his oath, as required by law, of all property, both real and personal, in his possession or under his control, and which he is required to list for taxation, either as owner or holder thereof, or as a guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, patron, agent or factor." Article 4681 prescribes what the statement mentioned in article 4680 shall contain, including forty-six different paragraphs or clauses. Article 4682 relates to certain portions of credits and shares which are not required to be listed for taxation, and the note thereto relates to the repeal of the dog-tax. Article 4683 prescribes the manner of listing or rendering real estate and what the statement must contain. Article 4684 relates to banks, brokers, and the like, showing what they are required to render for taxation, and the time and manner of doing it, and what shall be listed as money, what as personal property, and the like. Article 4685 relates to certain deductions therein specified. Article 4686 gives the duty of railroad corporations, specifying their duties

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in regard to listing property for taxation; and article 4687 is on the same subject. Article 4688 relates to taxes of property of private corporations. The remaining articles of this chapter relate to details, and have no bearing upon the present inquiry.

Some of the articles in the succeeding chapter, 3, of the same Title may be referred to as bearing upon the proper application of the penal law. This chapter, besides providing for the election and qualification of assessors and the filling of vacancies, in article 4699 gives authority to assessors of taxes to appoint one or more deputies to assist him in the assessment of taxes, and article 4700 gives authority to the deputies appointed in accordance with the provisions of article 4699, to do and perform all the duties imposed on and required by law of assessors of taxes, and renders the deputy's acts as binding and valid as if done by the assessor of taxes in person. In article 4707 it is provided that "If any person who is required by this title to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the office or usual place of residence or business of such person, a written or printed notice requiring such person to meet him and render a list of his property at such time and place as the assessor of taxes may designate in said notice. The assessor of taxes shall carefully note in a book the date of leaving such notice." Succeeding articles relate to the duties of assessors on failing to obtain a list from the taxpayer and prescribes forms and the like for making assessments of taxes. Article 4713 requires assessors to use the forms and follow the instructions prescribed by the comptroller of the State.

Boards of equalization are also provided for, and by article 4716 it is provided that "The assessors of taxes shall furnish the board of equalization, on the first Monday in June of each year, or as soon thereafter as practicable, a certified list of names of all persons who either

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refused to swear or qualify, or sign the oath or affirmation as prescribed in this title; also a list of the names of those persons who refused to render a list of taxable property as required by this title. And should any person so failing or refusing to take the oath prescribed, or to render a list of their property, or to subscribe to the oath as required by the provisions of this title, fail to give satisfactory reasons for such failure or refusal to the board of equalization within one month from the date of the filing of said list by the assessor as required by this article, the board of equalization shall return a list of all persons who have failed to give satisfactory reasons for such failure or refusal to render, qualify, or subscribe to the oath or affirmation, as the case may be, to the assessor of taxes, who shall present said list to the grand jury of his county next impaneled after the board of equalization has furnished him with the list above required." The article of the Penal Code under which the present case is prosecuted, already referred to as article 113, is here placed in juxtaposition to article 4716 of the Revised Statutes, just cited, and is as follows: "If any person shall refuse or neglect to make out and render a list of his taxable property when called upon in person by the assessor of taxes or his deputy, or shall fail or refuse to qualify to the truth of his statement of taxable property, or shall fail or refuse to subscribe to any oath or affirmation required by law in the rendition of taxable property, he shall be fined in any sum not less than twenty nor more than one thousand dollars."

It will be observed that by the letter of this article of the Penal Code the bare failure or neglect to do the particular thing required would, on conviction of the delinquent, subject him to the fine imposed by this article, and that no provision is made for any excuse whatever which would relieve him from the penalty; whereas by the Civil Statutes on the same subject he would be entitled to give

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a satisfactory reason for such failure or refusal to the board of equalization within one month from the date of the filing of the list by the assessor. The list of delinquents is required to be furnished by the assessor to the board of equalization on the first Monday in June of each year, or as soon thereafter as practicable. Rev. Stats. art. 4716. He is not liable to have his name returned unless he fail to give satisfactory reasons for such failure to the board of equalization within one month of the date of the filing of the list by the assessor, and it is not until after all this has taken place that the statute requires that the list shall be given by the board of equalization to the assessor, and he is required to present the list to the grand jury. To our minds the law never contemplated that a criminal proceeding should be resorted to until the civil remedies for the collection of taxes had been exhausted, or that the criminal law can be resorted to until the person in default has been afforded the opportunities prescribed by the Civil Statutes in order to excuse himself for the seeming neglect or failure to do the thing the law required of him. It is worthy of note that the concluding portion of article 4716, Revised Statutes, seems to indicate when criminal proceedings may be resorted to against the one in default, by the provision, among others, that, upon his failure to give satisfactory reasons for his default, the board of equalization shall return the list to the assessor, and that he shall present it to the grand jury. The law requires that the assessment of taxes shall be made between the 1st day of January and the 1st day of June of each year, and the list of those who have failed to return their lists of taxable property is required to go into the hands of the boards of equalization by the first Monday in June thereafter. So that, in our opinion, the taxpayer must have an opportunity to exculpate himself before the board of equalization, before he would be amenable to the penal statutes.

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In the present case against the appellant the prosecution was commenced on February 10, 1881, for failing and refusing to render a list of his taxable property on January 29, 1881. It was admitted that the defendant had rendered a list of his taxable property in Tyler on February 7, 1881, which was before the prosecution was commenced against him. So that, whether he was in default or not in the first instance, he had set himself right before he was prosecuted criminally.

We do not deem it important or necessary to discuss the questions raised upon the evidence and set out in the records. For the reason that, in our opinion, the prosecution was commenced prematurely, the judgment of the County Court will be reversed, and the prosecution will be dismissed.

Reversed and dismissed.

JIM WILLIAMS v. THE STATE.

1. CONTINUANCE—NEW TRIAL.—No application for a continuance asked on account of the absence of a witness is now grantable as a matter of right; but, when a continuance has been refused and the defendant convicted, if it appeared at his trial that the evidence of the absent witness was material and probably true, then a new trial should be granted.
2. CHARGE OF THE COURT.—It is not incumbent on the trial judge to give in charge to the jury the law applicable to a deduction which the jury could not reasonably draw from the evidence.
3. PENALTY.—Within the limits prescribed by law, the amount of the punishment is a matter for the determination of the jury alone. The court is concerned no further than to see that those limits are not transcended by the assessment made by the jury.

APPEAL from the District Court of Robertson. Tried below before the Hon. W. E. COLLARD.

The indictment charged the appellant with the theft of a horse belonging to P. B. Waters, on May 4, 1881. The

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jury found him guilty, and assessed his punishment at a term of ten years in the penitentiary.

Waters, the owner of the animal, testified to its disappearance from the range about the time alleged, and without his knowledge or consent. Information caused him to suspect the appellant, and to obtain a warrant for his arrest. He soon effected the arrest, and after doing so asked appellant about the missing animal, which was a mare and branded on the shoulder with letters designated by the witness. Appellant said that he had had the mare, and had traded her in the town of Marlin to a man named H. Rickerman. Defendant further said that Sam Henderson had turned the mare over to him to trade for a Mexican named Joe; that he, defendant, understood that the mare belonged to the Mexican, and that the latter wanted him to trade her off. Defendant said he would go with witness and show him the mare. They went to Marlin, and there the witness found his mare in the possession of Rickerman. The statement of the defendant to witness was made voluntarily and freely.

Tom Harper, for the State, testified that the defendant, about the date alleged in the indictment, had a bay mare which he proposed to trade. Witness offered to trade for her, but defendant said he wanted a work horse as his horse had been hooked by an ox, and that if he did not trade with a man who had offered to trade him a horse he would come back and trade with witness.

H. Rickerman, for the State, testified that the defendant, on May 6, 1881, came to witness's store in Marlin, and wanted to trade a bay mare, which was branded on the shoulder with the letters designated by Waters. Witness traded a horse to the defendant for the mare, and had his clerk write a bill of sale for the defendant to execute. Defendant could not write, and had the clerk to sign the name "Sam Henderson" to the bill of sale.

The defense introduced no evidence. Before the trial

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he applied for a continuance for the purpose of obtaining the testimony of one Hanna, by whom he alleged he could prove that the mare was delivered to him by Sam Henderson, who represented that she belonged to a Mexican named Joe, and that he authorized defendant to trade her off. The continuance being refused, exception to the ruling was reserved by the defense.

F. H. Prendergast, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. When a defendant in a criminal prosecution applies for a continuance on account of the absence of a witness, the application, though it be the first or any subsequent application, and though the application contain the several requisites enumerated in the statute, is addressed to the sound discretion of the court to whom it is made, and is not to be granted as a matter of right on meeting the requirements of the statute for a first application, as was formerly the case under laws then in force. The rule now is that when an application for a continuance has been overruled and the defendant has been convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application for a continuance was of a material character, and that the facts set forth in the application for a continuance were probably true, it then becomes the duty of the trial judge to grant the defendant a new trial. Code Crim. Proc. art. 560, clause 6.

Looking back through the trial, and considering the statements of the absent witness in connection with the testimony of the witnesses who testified at the trial, we are constrained to say that there was good ground to suspect that the evidence it was expected to procure from the absent witness, instead of being of a material character and probably true, was a sheer fabrication, neither

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material nor probably true. There was no error in refusing the application or in refusing to grant a new trial on this account.

The second supposed error assigned is to the effect that the court erred in not charging the jury that the possession of property recently stolen was not sufficient to sustain a conviction of theft, if the accused give a reasonable account of how he came in possession of the property, unless there are other facts showing his guilt. This supposed omission seems to be based upon the idea that the only evidence of the defendant's guilt was the fact that the property which had been recently stolen was traced to the defendant's possession, and that the property having been found in his possession was the only evidence of his guilt.

We do not so understand the testimony, as we find it in the statement of facts. In the first place, the defendant after his arrest stated that he had been in possession of the animal, and had traded it to a man in Marlin, giving the man's name; which statements were subsequently found to be true, and which tended to fix guilt upon him, and which were admitted without objection, and would have been admissible even if objected to, under the provisions of article 750, Code Criminal Procedure, in that his confession was found to be true and led to the discovery of the stolen property. This is not all; in giving a bill of sale he gave it in the name of another person and not his own, and, besides, he is shown to have claimed the property as his own to more than one person and at more than one place, and at the time he traded the animal and before. To one witness he claimed to desire to trade the animal for a work horse, on the pretense that his had been gored by an ox; which went far to negative the idea that he was trading the animal for either the man Henderson or the Mexican Joe.

The testimony did not require of the trial judge such

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a charge as that indicated by the assignment of errors. It was the duty of the judge to charge the law applicable to every legitimate deduction the jury might reasonably draw from the testimony; and having done this, he was not required to do more.

It is urged in behalf of the appellant that, as there were no circumstances of aggravation proved against the accused, the verdict is excessive, and that a new trial should have been granted on that account. The law has fixed the punishment for the offense of which the appellant has been convicted; the minimum at five years, the maximum at fifteen years. Penal Code, art. 746. When a jury has determined that the accused is guilty, it then becomes their duty to fix the punishment within these limits. The courts have nothing to do with the amount of the punishment (unless absolutely fixed by law. Code Crim. Proc. art. 712), further than to see that it is within the bounds prescribed by the law.

We are of the opinion that the other supposed errors are not well taken, and that the judgment must be affirmed.

Affirmed.

NEIL COLE v. THE STATE.

1. **INFORMATIONS — VARIANCE.**— The particularity requisite in an information is not necessary in the affidavit on which it is founded, nor are discrepancies between them of any consequence provided there is accordance in substance. They should agree as to the time and venue of the offense and the names of the defendant and the injured party, and there should be substantial conformity in their allegations descriptive of the offense.
2. **SAME.**— An information for aggravated assault and battery was founded on an affidavit which, after charging an aggravated assault, alleged specific acts of personal violence. *Held*, that there is no variance between the information and the affidavit.

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3. PRACTICE.— At a trial for a misdemeanor the evidence was admitted and the argument to the jury progressing when it was discovered that the information had not been read and that no plea had been made by or entered for the defendant. Over objections by the defense, the trial court allowed the prosecuting counsel to read the information to the jury, and caused the plea of not guilty to be entered for the defendant, who refused to plead; and thereupon the argument was resumed and the trial concluded with the conviction of the defendant, who duly reserved exceptions. The trial judge accounts for his rulings on the ground that his attention had not been called to the irregularities complained of, and that the defense made no objection to the evidence when it was introduced. But *held* that the trial was conducted with such disregard of statutory requirements that, whether the defendant suffered prejudice or not, the conviction cannot stand.
4. SAME — PLEA.— Without a plea made by or entered for the defendant, there is no issue and can be no legal trial. Except in capital cases, the proper time to require the defendant to plead is when the case is called for trial and the parties announce ready, or a continuance has been asked and refused; and if the defendant, when called on to plead, refuses to do so or stands mute, the court should then cause the plea of not guilty to be entered for him.

APPEAL from the County Court of Kaufman. Tried below before the Hon. W. CHARLTON, County Judge.

The opinion contains everything relevant to the rulings. The jury found the appellant guilty of aggravated assault and battery, and assessed his punishment at a fine of \$25.

Smith & Word, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The affidavit upon which the information is based charges the defendant with committing an aggravated assault upon Lucy Price, "by striking, beating and bruising her the said Lucy Price," and states that Lucy Price was then and there a female, and the defendant an adult male. The information charges that the defendant, at a stated time and place, "did unlawfully

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make an aggravated assault and battery in and upon the person of Lucy Price, the said Neil Cole being then and there an adult male person, and did then and there strike, beat and bruise the said Lucy Price, who was then and there a female, with intent then and there to injure her."

Two objections are raised against the sufficiency of the information by the defendant's motion to quash: 1, that the information is not supported by the affidavit upon which it purports to be founded; and 2, that the information charges an aggravated assault and battery, while the affidavit charges only an aggravated assault.

We are of opinion these objections are not tenable. The affidavit charges an aggravated assault *eo nomine*, and sets out the circumstances constituting the battery, which in our opinion is all the particularity the law requires to be shown in an affidavit upon which to base an information. We are not aware of any rule of law which requires the same particularity in preparing an affidavit for an information which is required of the criminal pleader in preparing an information based upon the affidavit. The demands of the law seem to be met when there is a substantial agreement between the affidavit and the information in matters of substance. They must agree as to the time and place of the commission of the offense, as well as to the names of the alleged wrongdoer and the injured party, and there must also be a substantial agreement as to the description of the offense intended to be charged; but we are not aware of any rule of law which requires any particularity as to the forms of expression required in the affidavit in setting out the substantial portions.

In the present case it is not claimed that there is any material variance between the affidavit and the information except that, as stated in the motion to quash, it is contended that the information charges an aggravated assault and battery, whilst the affidavit only charges an aggra-

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vated assault. As we have seen, the affidavit charges in terms the commission of an aggravated assault, and sets out in connection therewith the circumstances of the assault which constitute the battery,—thus, by *striking, beating*, etc.,—and that the injured person was a female and the assaulting party an adult male. The affidavit charges an aggravated assault, and sets out the circumstances which render the offense an aggravated assault and battery, agreeably to article 495, Penal Code. In our opinion the affidavit forms a sufficient support for the information for an aggravated assault and battery committed by an adult male on the person of a female, and the court did not err in overruling the motion to quash. Code Crim. Proc. art. 236; *Smith v. State*, 9 Texas Ct. App. 315.

We gather from bills of exception that some time after the trial of the case had commenced, and after the witnesses for both the State and the defendant had been examined, and the county attorney had commenced his opening argument, the court became aware of the facts that the information had not been read on the trial, and that the defendant had not been called on to plead. At this stage of the trial the court, over objection by the defendant, required the information to be read and the plea of “not guilty” to be entered for the defendant. The bill of exceptions states that after the plea was entered “no further evidence was heard for either the State or the defendant, and that the case was required by the court to be submitted to the jury on the evidence which had been heard prior to the entering of said plea of not guilty;” to all which the defendant objected. The bill of exceptions sets out the fact that when the case was called for trial the defendant was not required to plead, by himself or his counsel, whether or not he was guilty of the charge against him, and that when the cause was called for trial the information was not read or presented to the

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jury, and the defendant was not required to plead. The judge explains his action by stating, in giving bill of exception No. 1, that the evidence had been introduced without objection, and in giving bill No. 2, that the court's attention was not called to the omission of the reading of the information before it was read as shown by the bill of exceptions.

It is contended by the Assistant Attorney General, on behalf of the State, that the supposed errors complained of by the defendant amount only to errors in practice, and that it is not indispensable in practice that the information should have been presented or read at any particular stage of the trial, or that when the defendant was called on to plead and declined to do so it was competent for the court to cause the plea of not guilty to be entered for him when it was done as shown by the bills of exception, and that the defendant had whatever benefit the law conferred upon him, and it does not appear that he has been injured by the course pursued at the trial; that the information having been read and the plea entered, though not done at the commencement of the trial, nothing is shown to have resulted to the defendant's injury, and that he ought not now to be heard to complain.

In our opinion the cases cited do not fully sustain the position contended for. In *Smith's case*, 1 Texas Ct. App. 408, this court said, citing *Early v. State*, Id. 248, that an arraignment is a necessary preliminary to the trial in a capital felony, and it was further held that, it appearing in *Smith's case* that he had been arraigned at an improper time, and because the record showed an arraignment but at an improper time, we would not reverse the judgment on that account; the fact being that the record showed an arraignment before the trial proper had commenced, whilst in the present case the testimony had all been heard and the argument had commenced. We fail to perceive such analogy between the two cases as that the ruling in the one would be applicable to the other.

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We are of opinion that in the present case the rules of law have not been observed, and that it would be an unwise and dangerous practice to permit the trial courts to proceed in this irregular way, even in a misdemeanor case and even though no special injury is shown to have resulted to the appellant. The rules of practice are plainly laid down in the written law. Those rules should be observed rather than something else be substituted in their stead. A trial without a plea is not a trial, and this court has uniformly reversed a conviction upon such a trial, and if the defendant refuses to plead at the proper time, the plea of not guilty must *then* be interposed for him. *Hunt v. State*, 9 Texas Ct. App. 570. The proper time for the defendant to plead in all cases less than capital is indicated in article 603 of the Code of Procedure as being when the case is called for trial, and when the case is called for trial he is required to plead before the trial proceeds any further. The article is as follows: "In all cases less than capital the defendant is required, when his case is called for trial, before it proceeds further to plead by himself or his counsel whether or not he is guilty." And "By the term 'called for trial' is meant the stage of the case when both parties have announced that they are ready, or when a continuance having been applied for has been denied." Code Crim. Proc. art. 604. The law further provides: "If the defendant answers that he is not guilty, the same shall be entered upon the minutes of the court; if he refuse to answer, the plea of not guilty shall in like manner be entered." Code Crim. Proc. art. 517.

In our opinion the proper course would have been to set aside all that portion of the proceedings which had not been had in compliance with the requirements of law, which in the present case would have required the commencement of the trial *de novo*.

Other questions presented need not be considered, for the reason that they are not likely to arise on another

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trial. For the reason that the present trial was not conducted with a proper regard for the forms prescribed by law, but in such a manner that the conviction ought not to stand as a precedent, the judgment will be reversed, and the cause remanded for a new trial in due form of law.

Reversed and remanded.

W. H. KENNEDY v. THE STATE.

1. **INDICTMENT — EVIDENCE.**— Indictment for misdemeanor charged the commission of the offense on the 18th of August, and by the clerk's indorsement on the indictment it appeared to have been filed in court on that date. But the record entry of presentments by the grand jury showed that the indictment was returned into court on the 19th of August,—a date subsequent to that on which the commission of the offense was charged. *Held*, that the record entry of presentments was admissible for the purpose of showing the true date on which the indictment was presented by the grand jury.
2. **SAME.**—The prosecution was allowed to elicit from a witness the statement that the offense was committed before the presentment of the indictment. *Held*, that this was not amenable to the objection that it was the allowance of parol evidence to contradict or vary a record.
3. **ASSAULTS.**—On a trial for aggravated assault a conviction may yet be had for simple assault, though the Revised Penal Code omits the former provision expressly authorizing such convictions.

APPEAL from the County Court of Delta. Tried below before the Hon. C. S. NIDEVER, County Judge.

The appellant, on an indictment for aggravated assault, was convicted of simple assault and fined five dollars. The opinion states the matters involved in the rulings.

E. B. Perkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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WINKLER, J. The indictment charging that the offense was committed on August 18, 1878, and appearing by its indorsement to have been filed in the District Court on that day, and the law prescribing the requisites of indictments requiring, among other things, that the time mentioned as the date of the offense must be some date anterior to the presentment of the indictment, it was undertaken by the prosecution to show that the offense was in fact presented in the District Court by the grand jury at a date posterior to the date of the file-mark of the clerk upon the indictment. For this purpose the county attorney offered in evidence the certified transcript which accompanied the case when it was sent down from the District Court for trial in the County Court. The court permitted the transcript to be read, over objection of the defendant, as shown by a bill of exceptions.

The court, in our opinion, did not err in permitting the transcript to be read as evidence on the trial. Both the indictment, with the file-mark of the clerk of the District Court, and the transcript of the proceedings had in the District Court, were parts of the record of the case when it reached the County Court for trial, and were admissible in evidence on the question before the court, the transcript appearing to have been properly certified by the clerk of the court wherein the proceedings were had.

On the same subject and for a similar purpose the county attorney was permitted, over objection by the defendant, to ask a witness if the offense was committed before the presentation of the indictment. Whilst it is true that parol evidence is not permissible to contradict or vary the terms of a written instrument, much less a solemn record of a court at the time accessible, still we do not understand that this testimony was offered for any such purpose. To our minds, this testimony was sought to be introduced for the purpose of strengthening the State's theory of the question, that the transcript and not the

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file-mark upon the indictment showed the true date of the presentation of the offense in and to the District Court by the proper grand jury. For this purpose the question was proper and the answer obtained was legitimate evidence, and the court did not err in permitting the question to be asked and answered. Says Mr. Wharton, "All facts that go either to sustain or impeach a hypothesis, logically pertinent, are admissible." Wharton's Crim. Ev. § 24, and authorities cited in note 2.

It is not shown by the statement of facts that the transcript of the record from the District Court was read as evidence on the trial. It is, however, shown by one of the bills of exception reserved at the trial that it was introduced over objection of the defendant; and that transcript being embraced in the transcript before us, it is entitled to be considered as a part of the evidence in the case. In passing upon the testimony we are of opinion the transcript shows that the prosecution was presented on August 19, 1879, and not on August 18, 1879, as shown by the file-mark of the clerk on the indictment; and therefore the offense was prosecuted by indictment at a date subsequent to the alleged date of its commission.

It is claimed in the defendant's motion for a new trial that the court erred in permitting the introduction of testimony tending to convict the defendant of an aggravated assault and battery when the jury had acquitted of an aggravated assault. If such were in fact the case, which it is not perceived, the fact should be shown from the statement of facts or by a proper bill of exception set out in the record on appeal; neither of which appears to have been done in the present case. It is true the record shows that the defendant was charged with an aggravated assault and that he was convicted of a simple assault. This was permissible under the law, and, though the contrary has heretofore been urged before this court, has been so decided. *Harrison v. State*, 10 Texas Ct. App. 93.

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The motions for a new trial and in arrest of judgment appear to be based mainly on supposed errors in admitting evidence, which we have already noticed. We fail to find any such error in the ruling of the court on either motion as would warrant a reversal of the judgment. It is therefore affirmed.

Affirmed.

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29	325

LAD DAFFIN *v.* THE STATE.

1. EVIDENCE.—The Code of Procedure, article 785, provides that husband and wife may testify for each other in all criminal actions, but that, except in a prosecution of one of them for an offense against the other, neither shall testify against the other; and this rule has been held to disqualify either as a witness against a co-defendant of the other. But if either of them be competent as a witness against the party on trial, the other is also.
2. PRACTICE.—Objection to the competency of a witness or the admissibility of evidence should be made when the witness or evidence is offered, or as soon as the objection is ascertainable. If primarily made after verdict, such objections are not ordinarily available.
3. CROSS-EXAMINATION.—Any question which may tend to affect the credit of a witness is generally allowable in his cross-examination. His relations to the accused, or bias against him, and the extent of the bias, may be developed in the cross-examination. See this case for an example.

APPEAL from the District Court of Robertson. Tried below before the Hon. W. E. COLLARD.

Appellant was tried on an indictment which charged him with the theft of a barrel of sugar from the Houston and Texas Central Railway Company, on January 11, 1881. The verdict of conviction assessed his punishment at a term of three years in the penitentiary.

It appears by the evidence that W. T. Hill, a merchant in Bremond, Robertson county, on his way from his store to his residence, early in the night of the alleged theft,

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found a barrel of sugar lying on the ground close to the railway track, and observed two men making a suspicious approach towards it. He went at once and informed Mr. Black, a clerk in the freight depot, and they went to the barrel and so placed it that the clerk could keep a watch upon it. Mr. Hill knew the appellant and Frank Williams, but could not identify either of the two men he saw approaching the barrel.

The clerk and the local agent of the Railway Company were examined to prove the loss of the barrel from a freight train.

Ann Williams, the State's witness referred to in the opinion, gave the only testimony inculcating the appellant. She was the wife of Frank Williams, and stated that, early in the night of the alleged theft, the appellant came to the house occupied by witness and her husband, and called the latter to the door and told him he had a barrel of sugar for him, and said that he had got it out of the car. After talking a little while, the appellant and Frank Williams went off together towards the depot. The next morning the appellant came again and told witness that he and Frank Williams had like to have got into a scrape the night before; that they were at the cars getting a barrel of sugar, when Mr. Hill and Mr. Black came along and nearly caught them.

On her cross-examination the witness stated that when appellant came and called her husband they went behind the house and talked, and she went to the wall and heard what they said. They talked low. Witness never said anything about the barrel of sugar until about four months afterwards, and after she fell out with her husband and the appellant. She fell out with them both about the same thing, but it had nothing to do with the sugar. She went to have her husband arrested when she made the complaint against the appellant. Counsel for the defense asked the witness why she had fallen out

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with her husband and the appellant, but the court, on objection by the State's attorney, disallowed the question, and the defense excepted.

On the re-examination of the witness she accounted for her long silence about the matter by her husband's threat to kill her if she told it.

The defense examined some witnesses to establish an *alibi* for the appellant.

F. H. Prendergast, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. A special provision of our statute is that "the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." Code Crim. Proc. art. 735. And this rule rendering them incompetent to testify against each other has also in this State been held to render them incompetent against a joint offender with either. *Dill v. State*, 1 Texas Ct. App. 278.

As stated by Mr. Wharton in his work on Criminal Evidence, the rule is that "whenever a defendant is incompetent to testify for or against a co-defendant, then the husband or wife of such person is to the same extent incompetent. Thus, on a trial for conspiracy the wife of one of the defendants should not be allowed to testify against one of the others as to any act done by him in furtherance of the common design, if there be any evidence given connecting the husband with the defendants in the general conspiracy." Whart. Crim. Evid. [8th ed.] 391.

In the case before us it is not made to appear that Frank Williams, the husband of witness, was being prosecuted at all for this offense; the record here certainly

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does not show him to be a joint defendant in this case. If a prosecution had been commenced against him and afterwards *nolle prossed*, the wife would have been competent it seems (1 Texas Ct. App. 278), and whenever a co-defendant is admissible his wife would be admissible. Whart.'s Crim. Ev. § 391; *Blackburn v. Comm.* 12 Bush (Ky.), 481; *Ray v. Comm.* 12 Bush (Ky.), 397.

But, even if it had been made to appear that the witness was incompetent on account of her relationship as wife to a joint or co-defendant, still in this instance the testimony was not objected to at the time by the defendant, and an objection to the inadmissibility of evidence cannot be availed of after verdict, when no objection was interposed at the time it was admitted. Objection to incompetent or inadmissible evidence should be made as soon as its illegality can be ascertained. *Cole v. State*, 40 Texas, 147; *Harman v. State*, 3 Texas Ct. App. 51.

The main witness against defendant was one Ann Williams. On her examination it was developed that, subsequently to the date of the alleged offense, she, the witness, had had a difficulty with both her husband and this defendant, on account of which she, months after this offense was charged to have been committed, procured or endeavored to procure the arrest of her husband, and at the same time made complaint against defendant, upon which he was arrested for the crime preferred against him in this indictment. To show the extent of her bias and prejudice towards defendant, his counsel proposed to have the witness state the nature and cause of this difficulty, which, on objection by the prosecution, was excluded by the court. In this we are of opinion the court erred. Generally on cross-examination a witness may be asked any question which may have a tendency to affect his credit, and it is the right of the defendant to show the *animus* and bias of a witness towards him, and its extent, if he can. Whart. Crim. Evid. (8th ed.) § 376; *Blunt*

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v. *State*, 9 Texas Ct. App. 234. And as to his relations to the defendant, he may always be asked. Whart. Crim. Ev. § 477.

For error in excluding or refusing to permit the introduction of this evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

J. P. AND D. W. BOYD v. THE STATE.

1. INFORMATION — AFFIDAVIT. — A *nolle prosequi* of a former information does not preclude the use of the affidavit therefor as the basis of a new information. *Goode v. State*, 2 Texas Ct. App. 520, cited on this subject with approval.
2. FALSE IMPRISONMENT. — See evidence held insufficient to sustain a conviction for false imprisonment though but a nominal penalty had been imposed.

APPEAL from the County Court of Delta. Tried below before the Hon. C. S. NIDEVER, County Judge.

A fine of one cent was the penalty assessed against each of the appellants upon their conviction on an information which charged them with the false imprisonment of one William Portwood, a boy who was the nephew of J. P. Boyd. The appellants were father and son, and all the witnesses were relatives of each other, and of the appellants.

Mrs. Pickens, the first witness for the State, was the sister of J. P. Boyd, and the aunt of D. W. Boyd and William Portwood. She testified that about March 27, 1880, William Portwood came to her house from J. P. Boyd's, where he had been staying for a month or so. He had been sick with the measles, and informed witness that he left the Boyds because they did not treat him well. That same evening, Mary Taylor came and told

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William Portwood that his uncle, J. P. Boyd, said for him to come home; but William did not go. The next morning, D. W. Boyd and his brother Johnnie came and told Portwood that their father, J. P. Boyd, said for him to come home. Portwood refused to go with them, and D. W. Boyd went back home and, together with his father and mother, came back to witness's. J. P. Boyd and his wife came in a buggy, and got out and entered the house. J. P. Boyd took hold of William Portwood's arm or hand, and told him that he, Boyd, wanted him to go home. William got up and he and J. P. Boyd started out, when Jugurtha Portwood (sister of William) interfered and took hold of Boyd, who caught her by the hair and pushed her back, and then went on with William to the end of the hall, where Johnnie Boyd took hold of William's hand, went with him to the gate, and helped him on Johnnie's horse. Johnnie got up behind William, and they rode off. D. W. Boyd, so far as witness could state, did nothing unless it was to lead up the horse for William Portwood to get on. She did not think that William said he did not want to go with the Boyds, but when he got to the horse he said he was afraid of it. Witness told him to get on and go with them, and that they would neither kill nor drown him. He was between fifteen and eighteen years of age.

Jugurtha Portwood, for the State, gave much the same account of the matter in most respects, but stated that William, when Boyd took him by the arm, said he would not go, and then Boyd pulled him up; that she, the witness, took hold of William's hand, and Boyd caught her by the hair and threw her back on the bed, pulling out a handful of her hair. Up to that time there had been no falling out between witness and the Boyds, but they had a falling out when she went to get William's things and they would not let her have them. This comprised the evidence for the prosecution.

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Several witnesses testified in behalf of the defense. By their testimony it appears that the father of William Portwood died when he was small, and that his mother, who died a year or so before this prosecution, confided her children, and particularly William, to the care of her brother, J. P. Boyd, who, after her death, took him to his home and agreed to pay him ten dollars per month as hire for his services. According to witnesses for the defense, William was treated quite as well in the household of his uncle as the latter's children were, and there is nothing to the contrary in any of the testimony for the prosecution. Mrs. J. P. Boyd and Johnnie Boyd, who were present at Pickens's when the appellants came there to take William home, saw no constraint put upon him, and heard him express no other objection than his dread of the horse.

E. B. Perkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellants moved in the court below to quash the affidavit and information, and after verdict moved in arrest of judgment, on the ground substantially that the affidavit upon which the information was founded is not sufficient in law to support this prosecution, for the reasons that the same affidavit had been used as a basis for another prosecution which had been *nolle-prossed*, and that the affidavit was a file-paper in another cause and the court could not allow it to be withdrawn and used in this case.

It is stated in a bill of exceptions that, on the first day of the term, an attorney who was aiding the county attorney in the prosecution of this case took, without leave of the court, in open court, and over objection by the defendants, from the files of another case the affidavit in question and caused the clerk to number and file it in

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this case; that the court's attention was called to it before the trial of this cause, and objection was made to the proceeding, which was overruled by the court. But the bill of exceptions further states that the affidavit referred to was filed by permission of the court. The precise objection to the employment of this affidavit is that it had been used as the foundation of another suit against the same parties, which the State had declined to further prosecute, and was therefore *functus officio*; and we presume that the first case had been dismissed when the affidavit was attempted to be used in this case.

We are of opinion that the objection to the affidavit is not well taken. A question quite similar to the one here presented came before this court in *Goode v. State*, 2 Texas Ct. App. 520. In that case the court said: "The fact that an insufficient or invalid information had been set aside or dismissed would not necessarily set aside and render null and void a good affidavit or complaint upon which it was based. We can see no objection to the use of the same complaint or affidavit as a basis or ground for a new and sufficient information; we fail to perceive how the rights of the defendant could in any manner be injured or prejudiced by such a course." We see no sufficient reason to change the opinion thus expressed in *Goode's* case, or that the reason for the ruling is changed because the case had been *nolle-prossed* instead of being dismissed. If, indeed, they are not technically the same, they both have the same effect upon the case.

We are of opinion, however, that the court below should have granted the defendants a new trial on the ground of the insufficiency of the evidence. The principal witnesses both for the State and the defendants seem to be relatives of each other and related to the defendants as well as to the injured person. It appears that the person alleged to have been falsely imprisoned was an orphan boy, who by common consent had been placed under the

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care and control of one of the defendants, who was the uncle by marriage of the injured party. There is no testimony that he had violated the trust confided in him, or that he had failed to discharge the duties imposed upon him by the relation he bore to the injured party, who seems to be a mere boy and in need of some one to advise and control him. The boy did not testify at the trial, and the testimony is very meagre indeed that any force was employed in causing the boy to return home. No good cause is shown for the boy's leaving his uncle's roof, or that he objected to returning with him to it, the only home he is shown to have had; nor is it attempted to be shown that his home was other than a pleasant one.

We are of opinion the proofs do not sustain the charge of false imprisonment, and on this account the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

ED. CROSS *v.* THE STATE.

1. VENUE.—When the record fails to show proof of the venue of the offense the judgment of conviction will be reversed.
2. THE "RULE."—The enforcement of the rule to sequester witnesses rests in the discretion of the trial judge, and his action will not be revised unless that discretion was abused to the prejudice of the appellant. The Code of Procedure, art. 665, expressly provides that "in no case where the witnesses are under the rule shall they be allowed to hear the testimony or any part thereof." Witnesses who violate the rule, and the officer in charge of them, should be punished as for contempt of court.
3. PRIVILEGE OF COUNSEL.—The extent to which counsel may read to the jury from books is also a matter left largely to the discretion of the trial judge, and one which will not be revised on appeal unless that discretion was abused to the prejudice of the appellant.
4. SAME — PRACTICE.—The Code of Procedure expressly empowers the trial judge to regulate the order of argument in criminal trials, but entitles the State's counsel to the concluding address. In his open-

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ing argument the State's counsel should fairly develop his case and give the law he relies on; and the trial court should see that he does so. But the opposing counsel are bound to anticipate the line of argument to which the evidence suggests the State's counsel may resort in his conclusion.

5. PRACTICE IN THIS COURT.—If appellant's counsel agreed to the statement of facts, its recitals are conclusive upon him in this court.

APPEAL from the District Court of Robertson. Tried below before the Hon. W. E. COLLARD.

The appellant was tried upon an indictment which charged him with an assault upon Alls Manning, with intent to murder him, on April 18, 1881. The verdict found appellant guilty, and assessed his punishment at confinement in the penitentiary for a term of three years.

The testimony at the trial was quite elaborate, and there is no occasion to give it here in detail. The first witness for the State, according to the agreed statement of facts, was "Allston, commonly called Alls, Manning." He and the defendant lived in the same neighborhood, and had a "fuss" three or four months before the day alleged in the indictment. About eight or nine o'clock in the night of that date, Manning was seated on the gallery of his house when he was fired upon from outside his yard fence, which was about twenty steps distant. Eight shot struck him, some taking effect in his neck and others in his shoulder. He immediately sprang into his house and got his pistol, which he shot in the direction from which he had been fired upon. He did not see the person who shot him. After returning the fire with his pistol, he ran to the house of Mr. Smith, a short distance off, for the purpose of borrowing his gun; but he was so exhausted when he got there that he lay down on Smith's gallery. On his cross-examination, Manning stated that a short time before he was shot he had a difficulty with a man named Johnson, who made an

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indefinite threat as to what he would do the first time he caught witness out.

By the other testimony it appears that prompt action for the arrest of the defendant was taken by the sheriff and his posse. They found him at his home, and two guns there, of which one was a double-barreled shot-gun, one barrel of which was loaded and the other had been recently discharged. The charge remaining in the loaded barrel was drawn, and it was found to contain shot of which some corresponded with those taken from Manning's wounds. The wadding was yellow paper of the kind used to make paper sacks. A powder-burned piece of similar paper was found inside of Manning's yard near the spot from where he had been fired upon. It was in proof, on the other hand, that the kind of shot and of wadding drawn from the gun were in very general use. The defense made no effort to show where the defendant was when Manning was shot, and on this omission the district attorney laid stress in his concluding argument to the jury. The defense objected to this and appealed to the court to restrict the prosecuting counsel to the proofs in the case and the line of argument taken by the defense; and, the court overruling the objection, the defense reserved exceptions.

The opinion of this court either states or sufficiently indicates all other material facts.

A. N. Smith and John E. Crawford, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. No venue having been proven in this case, the judgment must be reversed. There are, however, several questions arising on the record upon which we are earnestly requested by counsel to pass, and will proceed to do so.

1. With regard to the sequestering of witnesses under

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the rule, most ample provision is made in the Code of Criminal Procedure, arts. 662 to 666 inclusive, and these provisions, where the rule has been invoked, should be carefully observed, and especially that portion of article 665 which provides that "in no case where the witnesses are under the rule shall they be allowed to hear the testimony in the case or any part thereof." It seems in the case before us that the witness complained of did not in fact hear the testimony of the other witness, though he was in the court room at the time the evidence was being given. Still, his presence in the court room was in violation of the rule, and should have subjected him and the officer having him in charge to punishment as for a contempt of court. Code Crim. Proc. art. 666. When a similar question arose in Avery's case, 10 Texas Ct. App. 200, it was held that the enforcement of the rule rests in the discretion of the trial judge, and that his action will not be revised unless abuse of that discretion to appellant's prejudice is made apparent. In this instance we see no cause to interfere with the action of the court in permitting the witness to testify.

2. It has been repeatedly held that the manner of conducting the argument of a case before the jury, and especially the extent to which counsel may in argument be permitted to read from books, whether legal or scientific, is another matter which is also confided to the sound discretion of the trial court, and one which this court will not revise unless it is made to appear that this discretion has been abused to the prejudice of the defendant. It seems that defendant's counsel read an instruction to the jury which had been commended by this court as a proper charge. In reply the prosecuting attorney read the facts in that case and commented upon the difference in the two cases, to show, doubtless, the applicability of the charge to the one and its inapplicability to the other. In permitting him to do so, we cannot perceive that the

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court erred. *Wade v. DeWitt*, 20 Texas, 398; *Hines v. State*, 3 Texas Ct. App. 483; *Bowen v. State*, 3 Texas Ct. App. 617; *Bingham v. State*, 6 Texas Ct. App. 169; *Hudson v. State*, 6 Texas Ct. App. 565; *Foster v. State*, 8 Texas Ct. App. 248.

But it is claimed further that injustice was done in that the prosecuting officer did not fully and fairly develop his case in the opening argument to the jury, and that defendant's counsel in consequence had no opportunity to reply to some of the positions assumed in the closing address. A similar question came up in the case of *Morales v. State*, 1 Texas Ct. App. 494, and it was said, "the State's counsel in his opening speech should fairly develop his case and give the law on which he relies. The presiding judge should require him in all cases to do this. If he failed to do this until his second speech, the presiding judge, in his discretion, would be authorized to let the defendant's attorney again address the jury, and then to allow the State's counsel to close the argument." Our statute provides that the order of argument is to be regulated by the judge, except that "in all cases the State's counsel shall have the right to make the concluding address to the jury." Code Crim. Proc. art. 667.

As presented in the bill of exceptions, we cannot see that the closing argument of the district attorney was unfair or unjust, nor can we say that it was not one which the defendant's counsel might not readily if not naturally have anticipated from the testimony.

3. Another error relied upon is a variance between the names of the party alleged to have been injured and the name as proven. In the indictment the injured party is called Alls Manning. Most if not all the witnesses call him Austin or Aus Manning. It does not appear that any particular witness specially testified that he was commonly known as or called Alls, but in the statement of facts, which was prepared and agreed to by counsel and

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approved by the court, with regard to the first witness who testified and who was the injured party, we find it stated that "Alston, commonly called Alls Manning, for the State, testified." It is but fair to presume that this was the statement of a fact which the counsel intended to establish and agree to, as well as any other fact embodied in the statement. If it was not a fact and one not proven, then defendant's counsel should not have signed a statement to that effect. Had the judge made up the statement, the parties having failed, then indeed there might have been some show of reason for the defendant to complain if the fact had not indeed been proven. But here he states the fact himself, and agrees that the statement as signed by him is "true and correct." We are unable to see how, in the face of his agreement, he can be heard to complain now.

4. The charge of the court upon circumstantial evidence was amply explicit and sufficient, without the special instruction asked in behalf of defendant.

Because the statement of facts fails to show that the venue of the offense was proven, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

C. PULLEN v. THE STATE.

1. CONTINUANCE — DILIGENCE.— Defendant's application for a continuance stated that he caused a subpoena to issue "immediately after his arrest," but left the time of his arrest unstated; and then alleged that the subpoena was returned "not found," and that "thereupon he caused an attachment to issue," but nowhere disclosed when the attachment was issued or the subpoena returned. *Held*, that these allegations were too indefinite to show diligence.
2. SAME.— If in an application for a continuance the disposition made of the process is alleged upon information and belief, the name of the informant should be disclosed.

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3. *SAME.*— All applications of a defendant for a continuance on account of the absence of a witness must state that the witness is not absent by the defendant's procurement or with his consent.
4. *INDICTMENT* for unlawfully branding a colt, with intent to defraud, was excepted to because it did not further describe the colt as an animal of the horse species. *Held*, that the exception was correctly overruled.

APPEAL from the District Court of McMullen. Tried below before the Hon. D. P. MARR.

Five years confinement in the penitentiary was the punishment assessed against the appellant. All matters involved in the rulings are disclosed in the opinion.

E. Edmonds, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. This appellant was convicted of felony in branding the colt of W. W. Talbot, with intent to defraud. A great many grounds are relied on for a reversal of the judgment of the court below. The first is, that the court erred in overruling the motion to continue. In this we think there was no error. The application is fatally defective for want of diligence. It is stated in said application "that immediately upon his arrest this affiant caused a subpoena to issue," etc. When the defendant was arrested does not appear in the record.

Again, the subpoena being returned "not found," the application further states: "that defendant thereupon caused an attachment to issue," etc. We are not informed when the subpoena for the witness was returned, and consequently are unable to learn when the attachment issued. But suppose the subpoena and attachment had been issued in due time, still the application is insufficient because it does not appear that the attachment was directed to the sheriff of Bexar county; nor does it appear

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that it was stamped and placed in the post office. Upon this point the motion is as follows: "That defendant thereupon caused an attachment to issue for said J. W. Yarbrough, which he is informed by his attorney, and believes, was duly placed in the post office, prepaid, addressed to the sheriff," etc. Who informed him? The affidavit of the person who sent this attachment is of vital importance just here. Without it we are of the opinion that the motion is defective for want of diligence. *Townsend v. State*, 41 Texas, 134; *Murray v. State*, 1 Texas Ct. App. 174.

The application is also insufficient in substance. It does not negative the fact that this witness was absent by the procurement or consent of the defendant. Art. 560, Code Crim. Proc.

The next ground for reversal is, that the indictment is defective, because it charges that the defendant branded a *colt*, without a further allegation that the colt was of the horse species. This, we think, is not necessary. "Colt" is as well understood as gelding, mare, stud, steer, heifer, cow, or bull. *Horse* is the generic name of the equine species, *cow* of the bovine; to name one of the species is sufficient. *Short v. State*, 36 Texas, 644; *Robertson v. State*, 1 Texas Ct. App. 311.

The charge of the court is complained of. After a careful examination of the charge, we are of the opinion that it is full and complete, and liberal to the defendant,—adapted in every particular to the evidence. The refused charges,—some portions thereof,—were not supported by the case as made by the facts; that which was based upon the evidence was contained in the charge given by the court below.

It is urged that the evidence fails to support the verdict. We think it does support the verdict, and if necessary that fact could be demonstrated.

We have very carefully examined every error assigned

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by the able brief of the appellant, but are unable to discover such error as will justify a reversal of the judgment of the court below. It is therefore affirmed.

Affirmed.

JACK FREEMAN v. THE STATE.

1. INCEST — ACCOMPLICE TESTIMONY.— At the appellant's trial for incest with his step-daughter she was the principal witness for the State, and portions of her testimony tended to inculpate herself. *Held*, that the trial court should have given in charge to the jury the statutory provisions controlling accomplice testimony and its corroboration.
2. SAME.— If a witness implicates himself, his statement that his participation was compulsory raises an issue of fact on the solution of which depends the question whether his testimony is or is not that of an accomplice.

APPEAL from the District Court of Smith. Tried below before the Hon. JOHN C. ROBERTSON.

The indictment charged the appellant with incestuous intercourse with Jane Taylor, a daughter of his wife by a former husband. The verdict of conviction assessed his punishment at five years in the penitentiary.

The only evidence of the criminal intercourse was the testimony of Jane Taylor herself, a girl in her thirteenth year. She stated that the appellant took her into the bushes and then to an old out-house, where he kept her all night, and that he had sexual connection with her twice. The witness testified that she did not want the appellant to do so, and that it hurt her very much, being her first experience of the kind; but it does not appear that she made any objection, outcry, or resistance at the time, and the next day she gave to another State's witness a false account of her whereabouts the preceding night.

11	99
33	135
11	92
35	178
36	258
39	182
39	601

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Jennie Freeman, the mother of Jane Taylor and wife of the appellant, testified for the defense, but disclosed nothing of significance except the fact that Jane made no complaint of soreness the day after her nocturnal experiences with the appellant, and went to school as usual.

C. G. White, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The indictment charges that the appellant, Jack Freeman, on or about July 10, 1881, in Smith county, state of Texas, "did then and there unlawfully, knowingly and feloniously carnally know and have carnal intercourse with one Jane Taylor, the daughter of Jennie Freeman by a former marriage, she the said Jennie Freeman being then and there the wife of said Jack Freeman, and he the said Jack Freeman well knew the said Jane Taylor to be the daughter of his said wife Jennie Freeman at the time of his said carnal intercourse with her the said Jane Taylor as aforesaid." Having been tried and convicted and sentenced to the State penitentiary for a period of five years, the defendant has appealed to this court, his motion for a new trial having been overruled.

It is provided by statute that "All persons who are forbidden to marry by articles 330 and 331 of the Penal Code, who shall either intermarry or carnally know each other, shall be punished by imprisonment in the penitentiary not less than two nor more than ten years." Penal Code, art. 329. In article 330 are enumerated the females the law prohibits a man from marrying, and in article 331 are in like manner enumerated the male persons a female is prohibited from marrying in this State. Among the former it is declared that no man shall marry his wife's daughter, and among the latter it is declared that no woman shall marry her mother's husband after the death of her mother. Therefore if a man shall marry or

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carnally know his wife's daughter he would be guilty of the offense denounced in article 329, whilst, agreeably to the wording of the statute in article 331, a female is not prohibited from marrying her mother's husband until after the death of her mother. Thus the statute reads. Under the law the man was liable, whether the other party was or not, and his guilt was not dependent on her liability to prosecution.

On the trial below the principal witness for the State was the female named in the indictment of whom the defendant is charged to have had carnal knowledge. Under this state of case, counsel for the defendant requested the court to instruct the jury that the female was *particeps criminis*, and that they could not convict the defendant on her testimony unless corroborated by other evidence. The court refused to so instruct the jury, and a bill of exceptions was reserved. This ruling being assigned as error, it becomes necessary for this court to determine whether or not the prosecuting witness was an accomplice whose testimony needed corroboration in order to support a conviction. Mr. Wharton, in his recent work on criminal evidence, § 440, says: "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. The coöperation in the crime must be real, not merely apparent. Hence, although a woman who coöperates voluntarily with others to procure an abortion on herself is an accomplice, it is otherwise when she is the victim of force, fraud, or undue influence." With us, this court in *Watson v. State*, 9 Texas Ct. App. 237, held on a full examination of authority, that a woman who assented to the giving her a drug in order to procure an abortion, was a victim and not an accomplice, and did not require to be corroborated. See the case and the authorities there cited. An informer who purchases intoxicating liquors sold contrary to law, for the purpose of

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prosecuting the seller, is not an accomplice in the sense of requiring to be corroborated, and so of one of the bettors at the same game of faro, and of a detective who feigned complicity. *Stone v. State*, 3 Texas Ct. App. 675; *Wright v. State*, 7 Texas Ct. App. 574. If a witness implicates himself, it is immaterial that he claims to have been coerced. *Davis v. State*, 2 Texas Ct. App. 588. It would seem that, in order to determine whether the witness in the present case was an accomplice or not, in the sense of requiring corroboration, the proper inquiry would be, did she knowingly, voluntarily, and with the same intent which actuated the defendant, unite with him in the commission of the crime charged against him? If she did, she was an accomplice, and her uncorroborated testimony would not support a conviction.

In our opinion this inquiry must be answered in the affirmative, and that a proper instruction on the subject of the necessity of corroborating the girl's testimony should have been given.

The other errors assigned are not deemed well taken, and need not be specifically considered. For the error in the charge of the court, the judgment will be reversed and the case remanded.

Reversed and remanded.

 LEE GEORGE v. THE STATE.

1. AGGRAVATED ASSAULT.—Clause 5, article 496 of the Penal Code declares that an assault becomes aggravated when committed by an adult male on a female or child, or by an adult female on a child. *Held*, that "adult" means a person who has attained the age of twenty-one years; and in a prosecution based on this clause the State must prove that the defendant was an adult when the assault was committed.
2. SAME.—But, under clause 6 of the same article, a male minor could, it seems, commit an aggravated assault on a female by violent

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familiarity with her person, against her will, with intent to have sexual knowledge of her.

3. PLEA.—Without a plea made by or entered for the defendant, there is no issue to warrant the introduction of evidence, and nothing to try. The ruling on this subject in *Cole v. State*, ante, p. 67, referred to and approved.
4. EVIDENCE—PRACTICE.—The ruling in *Hewitt v. State*, 10 Texas Ct. App. 501, cited with approval.

APPEAL from the County Court of Delta. Tried below before the Hon. C. S. NIDEVER, County Judge.

The opinion indicates the material features of this case. It was in proof that the appellant was about eighteen years old, and the injured female testified that, against her will, and soliciting a sexual embrace, he seized her around the neck. She got away from him, and told him she would knock him down with a club if he touched her again. A fine of \$150 was the penalty assessed against him.

E. B. Perkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The offense charged in the information was an assault committed by an adult male upon a female. The evidence showed defendant to be of the age of eighteen years. At the instance of the county attorney a special instruction was given in the following language: "That the term 'adult male,' as used in the information, does not necessarily mean a person twenty-one years old, but means a male person who is grown in the common acceptance of the term." This instruction is in direct conflict with the rule laid down in *Schenault v. State*, 10 Texas Ct. App. 410, wherein it was held that "the word 'adult' as used in article 496 of the Penal Code signifies a person who has attained the full age of twenty-one years."

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Under the information in this case the State was compelled to prove "an adult male" as alleged; that is, a male who had attained the age of twenty-one years. But it may be asked, can an aggravated assault be committed under the other circumstances alleged by a male person under twenty-one years of age? We think so, but not under subdivision 5 of article 496, Penal Code, as was attempted herein.

It has been held time and again that violent and indecent familiarity with the person of a female, against her will, with intent to have improper connection with her, is an aggravated assault. *Pefferling v. State*, 40 Texas, 486; *Curry v. State*, 4 Texas Ct. App. 574; *Ridout v. State*, 6 Texas Ct. App. 249; *Veal v. State*, 8 Texas Ct. App. 474.

That an offense of such character and under such circumstances may and can be committed as well by a male under the age of twenty-one as by an "adult" is most unquestionable. The prosecution, however, in such a case should be based upon and carried on under subdivision 6th of article 496, Penal Code, the ground of the prosecution being that the means used in the infliction of the injury tended to disgrace the female assaulted. In harmony with this view we find the following emphatic language used by our Supreme Court in *Thompson v. State*, 43 Texas, 583, viz.: "The evidence shows an unwarranted liberty with the person of a female, of a gross, wanton and outrageous character, well calculated to arouse the strongest feelings of shame, mortification and indignation; which was therefore unquestionably an aggravated assault upon her." And in further support of this view we find that a male under our laws who has attained the age of fourteen years can be tried and convicted for rape or an assault with intent to commit rape. Penal Code, arts. 533-535.

Another error complained of is that the information

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was not read and defendant did not plead, nor was he called upon to plead, until after all the evidence in the case had been adduced. We have just had occasion in the case of *Cole v. State*, decided at the present term (*ante*, p. 67), to hold that such an error would be fatal to the validity of the verdict and judgment of conviction. Without a plea there would be no issue to support the introduction of evidence; there would be nothing to try.

Another error committed by the court was the refusal to permit defendant's witness, Mrs. George, to testify as shown by the 9th bill of exceptions. This bill recites that "late in the evening, the State having closed its testimony, the defendant, having introduced all his witnesses but one, made, by and through his counsel, the following statement,—that he would wish to introduce the testimony of defendant's mother, Mrs. George, on the next morning, and asked the court to continue the case over till next morning for that purpose, stating that he, defendant, would prove by his mother that, on the day this offense is charged to have been committed, she was standing in her door and saw the witness Georgia Nabors leave her (Mrs. George's) house and go down the road to where defendant was gathering brush, about 75 yards, and then stop and have a long conversation with defendant,—at least fifteen minutes. Defendant's counsel also stated that his, defendant's, mother was quite old and in feeble health, and he did not wish to bring her to the court-house until he was ready to introduce her, and that he would have her there before the court very early the next morning. Whereupon the court announced that the evidence must be closed that evening. That on the next morning, July the 12th, defendant's counsel, before the argument of counsel had commenced, offered to have the said witness sworn and testify, when the State's counsel objected and the objection was by the court sustained," etc.

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The circumstances detailed bring the case within the rule regarding "due administration of justice" enunciated in *Hewitt v. State*, 10 Texas Ct. App. 501, where a similar question was decided.

For the errors above indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

H. J. SNOW v. THE STATE.

JURISDICTION — TRANSFER OF MISDEMEANOR CASES FROM THE COUNTY TO THE DISTRICT COURT BECAUSE OF DISQUALIFICATION OF THE COUNTY JUDGE — POWER AND DUTY OF A SPECIAL DISTRICT JUDGE IN SUCH A CASE. — When, because of the disqualification of a county judge to try a misdemeanor case, it is transferred to the District Court, the jurisdiction of the District Court attaches as amply as if it was original and exclusive; and if the district judge also is disqualified in the case, a special district judge must be chosen or appointed as provided by law, and his election or appointment be made matter of record, and, in the event of an appeal, be brought up in the transcript. The special district judge is empowered to try or dispose of the cause in the District Court, but has no authority to transfer it back to the County Court for trial, even though a new county judge, not disqualified in the case, has acceded to the bench of that court; and therefore such a retransfer to the County Court cannot invest it with jurisdiction over the cause. See the opinion *in extenso*.

APPEAL from the County Court of Kaufman. Tried below before the Hon. WILLIAM CHARLTON, County Judge.

A fine of twenty-five dollars was the penalty assessed by the jury against the appellant. The gravamen of the offense was the switching of a little boy who was tramping down his wheat-shocks. The opinion states the facts underlying the ruling.

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J. S. Woods, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The indictment in this case, which was for a misdemeanor, to wit, an aggravated assault, was filed in the District Court on the 10th day of June, 1875. The case remained pending in that court until the 18th of April, 1877, when the court upon its own motion, not any longer having jurisdiction, under provisions of art. V, section 17 of the Constitution, and the act of 1876, p. 135 (Rev. Code Crim. Proc. art. 435), transferred the case for trial to the County Court. In the County Court it appeared that the county judge was disqualified from trying the cause, he having been of counsel theretofore in the case; so that on motion the cause was re-transferred for trial to the District Court. This action was based upon the provisions of section 11, art. V of the Constitution, as follows, viz.: "No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or where the accused or party injured may be connected with him by consanguinity or affinity within the third degree." Clark's Crim. Laws of Texas, art. 1389; Code Crim. Proc. art. 569.

"Any case pending in the County Court which the county judge may be disqualified to try shall be transferred to the District Court of the same county." Code Crim. Proc. art. 573.

In the District Court it also appears that the Hon. Green J. Clark, judge of that court, was disqualified from trying the cause by reason of the fact that he had also been of counsel for the defendant, before his elevation to the bench. The case, however, remained upon the docket of the District Court, without any further action being taken in it until the 24th day of June, 1881, when one

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J. E. Dillard, signing himself as special judge, re-transferred the case back to the County Court for the reason that the case, being a misdemeanor, was exclusively within the jurisdiction of the County Court, and that a new county judge was then presiding over the latter court who was not, as the former one had been, disqualified to try the cause.

In the County Court a motion in the nature of a plea to the jurisdiction was submitted upon the following amongst other grounds:

"1. Because the District Court has original jurisdiction of this cause.

"2. Because there is nothing in the record showing by what authority J. E. Dillard as special judge transferred this cause from the District Court.

"3. Because the record does not show how J. E. Dillard became special judge, nor does it show that he is now or was special judge."

Upon each of these grounds we think the motion was well taken and should have prevailed. Having been properly and legally re-transferred to the District Court, the jurisdiction of that court attached to the same extent as though the jurisdiction had been original or exclusive. If the district judge was disqualified also, the law pointed out the proper course of procedure, and under its provisions the parties or their counsel should have agreed upon an attorney of the court to preside as a special judge in the trial thereof. In case they failed to agree, the district judge should have certified the facts to the governor, who was required at once to appoint some practicing attorney, learned in the law, to try such case. Code Crim. Proc. arts. 750, 751.

If J. E. Dillard had been agreed upon as special judge, then he should have proceeded to try the case in the District Court where the jurisdiction had rightfully attached under the law, and where it was subject under the law to

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the same rules of procedure governing any other case within the jurisdiction of that tribunal.

Again, on the other ground the plea to the jurisdiction was well taken. "Under the express provisions of the Revised Statutes the proceedings incident to the election and qualification of a special judge must be made matters of record." Rev. Stat. art. 1141. And in *Brinkly v. Harkins*, 48 Texas, 235, it was held that when a case is tried before a special judge the record should show how he became special judge. *McMurry v. State*, 9 Texas Ct. App. 207. And so the record should show the authority of the special judge in any matter wherein he professes to have acted as such in a case.

Because the County Court had no jurisdiction, under the circumstances detailed, to try the case, the judgment will be reversed and the cause remanded that it may be tried in the District Court where it rightly belongs.

Reversed and remanded.

S. FLOREZ v. THE STATE.

1. BRIBERY — EVIDENCE.— Appellant was indicted for offering to bribe one L., "a deputy sheriff of said county." The State having proved that L. at the date alleged was and for some time had been acting as deputy sheriff and jailor of the county, the defense proposed but was not permitted to prove that L. had not been appointed in writing, nor sworn, nor otherwise qualified as directed by article 4520 of the Revised Statutes. *Held*, that it was sufficient for the State to prove that L. was a deputy sheriff *de facto* at the date alleged. The regularity of his appointment and qualification was not an issue in the case, and therefore the proof proposed by the defense was properly excluded.
2. SAME.— The alleged object of the corrupt offer was to obtain the release of a prisoner who was in the custody of L. as jailor, and it is contended by the appellant that, inasmuch as no *mittimus* to L. was in proof, the prisoner was not legally in his custody. But *held* that the manner in which the jailor became charged with the custody of the prisoner was a matter into which the appellant was not entitled to inquire.

Opinion of the court.

APPEAL from the District Court of Hays. Tried below before the Hon. L. W. MOORE.

The opinion discloses all material facts. Two years confinement in the penitentiary was the punishment assessed.

McBride & Walters, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was charged by the bill with offering to bribe the deputy sheriff of Hays county, and was convicted and sentenced to the penitentiary for a term of two years.

Ed. S. Lyell, the person to whom the bribe was offered, was deputy sheriff *de facto* and not *de jure*. Was the State required to prove under the indictment that he was deputy sheriff *de jure*; or was the allegation in the indictment supported by proof that he was merely deputy *de facto*? In governmental affairs a man frequently holds and exercises an office to which he has not been duly appointed. If, however, he performs the duties of the office under color of title, he is an officer *de facto*, and his official acts are binding on others. And if indicted for malfeasance in office, he will not be heard to object that he is an officer *de jure*; because, acting in that capacity, he is estopped from denying his *right* to act.

But the difficult question is whether third persons are indictable for resisting, assaulting, offering a bribe to, or bribing such officer. Upon this question Mr. Bishop says that, although the decisions on this point are not harmonious, the better opinion evidently is that they are; because the law does not permit them to test in this way the legality of the claim to office of those who hold the office under an appointment right. Other methods of

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testing the right are open. We concur with Mr. Bishop in such a case as the one now before us, and all others embraced in the latter portion of article 917, Bish. Cr. Law. To be more specific: if the party is an officer *de facto*, that is, acting notoriously in that capacity, and is bribed or offered a bribe, or is resisted or assaulted while in the discharge of the duties of the office, those who bribe, offer to bribe, resist or assault, are liable to prosecution, and they cannot depend upon the ground that he is not an officer *de jure*.

To hold that deputy sheriffs, constables and jailors, who have the custody of prisoners charged in a great many cases with capital felonies, can be bribed to discharge the felons, and when those guilty of the bribing are sought to be brought to justice and punishment, that they can plead that the custodians of prisoners were not in every particular legally appointed, would be a terrible doctrine indeed. Moral obliquity obtains in the one case as well as the other. The injury to public justice being the same, the defense, if one at all, is strictly technical, without foundation as we think in principle, and evidently against justice. And though the authorities are divided, with a large and respectable number of decisions against Mr. Bishop, we think he and those authorities in his support are clearly in the right.

It is claimed that the prisoner was not legally in the custody of the deputy sheriff, because the *mittimus* was directed to the sheriff, and not to the deputy sheriff, who was the jailor. There is nothing in this objection. The sheriff was the proper officer to whom the prisoner should have been sent. If the *mittimus* had been directed to the jailor, we do not think it would have been improper. In fact, the prisoner having undergone an examination for murder by the proper authority, and believed to be guilty, and so adjudged, whether he was sent to jail by written *mittimus* or not could not be inquired into in a

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prosecution for offering to bribe the jailor to release him.

The refused charge was a very good argument upon the merits of the case, and was therefore properly rejected by the court. Finding no errors in the record, the judgment is affirmed.

Affirmed.

HENRY FOSTER v. THE STATE.

1. HOMICIDE—RIGHT OF SELF-DEFENSE.—In a trial for murder there was evidence tending to prove that the deceased had made threats to kill the defendant, and that, when shot by the defendant, he had a pistol upon his person and was advancing on the defendant in a violent and threatening manner. *Held*, error to so charge the jury as to condition the defendant's right of self-defense upon his having resorted to all other preventive means, save retreat, before firing upon the deceased. On the contrary, if it reasonably appeared by the acts of the deceased, or by his words coupled with his acts, that it was his purpose to take the life of the defendant, or to do him serious bodily harm, the defendant, before slaying the deceased, was not bound to resort to all other preventive means save retreat, but had the right to slay him instantly and with the most effective means. This right accrued to the defendant not only at the very time the attack was being made upon him, but at any time after some act was done by the deceased showing an evident intent to take the life of the defendant.
2. SAME—CHARGE OF THE COURT.—Instructions to juries should carefully avoid confounding the essential distinctions which the Penal Code, in articles 570 and 572, establishes between those cases in which the assaulted party may slay his assailant without resorting to other means of prevention, and those in which it is incumbent on him to first resort to all such means save retreat. *Kendall v. State*, 8 Texas Ct. App. 569, cited on this subject with emphatic approval.

APPEAL from the District Court of Robertson. Tried below before the Hon. W. E. COLLARD.

The indictment charged the appellant with the murder of Phil Arnold on November 14, 1880, by shooting him

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with a pistol. The verdict convicted him of murder in the second degree, and assessed his punishment at confinement in the penitentiary for a term of five years.

Appellant, deceased, and the principal witnesses to the homicide were freedmen. There was no controversy over the fact that the deceased came to his death from a pistol shot fired by the appellant, and the only issue in the case was that of self-defense. The killing occurred in the town of Hearne, at night, and in a saloon where the appellant was bar-tender. J. Casby, testifying for the State, said that he was in the saloon on the occasion, but did not notice when the deceased came in, nor know he was there until he commenced quarreling. Several others were in the saloon. The appellant said, "Get out, boys, I want to close up the house;" and witness then remarked, "When negroes get into business, how quick they get stuck up." Appellant had closed the front doors, and those present were in the back room. Witness jestingly said to the appellant, "You won't do anything you say you will," and appellant said that his orders were to close and he was going to close, and he went and turned down one of the lamps. The deceased said, "Oh, you won't do a d—d thing you say you will," and the appellant replied, "You won't do what you say you will do." Deceased said, "I could kick the stuffin' out of you if I wanted to," and, with his hands in his pockets, he started in the direction of the appellant, who fired and the deceased fell. The ball penetrated the forehead of the deceased, just above his right eye. The appellant and the deceased were about ten or twelve feet apart when the pistol was fired, and witness thought the deceased was advancing on the appellant, who, however, was standing near the only door through which the deceased could have passed out. Until the deceased commenced quarreling, the witness did not know there was any difficulty between the parties. The deceased lived until the

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next evening. So far as the witness knew or had ever heard, the appellant was a quiet and peaceable man.

Fred Hawkins, for the State, narrated the facts very similarly to the preceding witness, but imputed somewhat different language to the appellant and the deceased. He stated that the appellant, after telling all to go out, turned down one of the lamps and was standing at the half-open door, with his hand on the door-knob, when the deceased said that he, defendant, was getting too d—n smart, and would not do anything he said he would. The appellant said, "You are a G—d d—d liar." Deceased said he would kick the defendant all over the house, and stepped towards him with his hands in his pockets. When the pistol fired and the deceased fell, he and the appellant were about ten or twelve feet apart, and witness was about three feet from the deceased.

Bob Williams, for the State, testified substantially to the same effect as the two preceding witnesses.

For the defense Lucy Williams testified that a few hours before the deceased was killed he came to where she lived and showed her a pistol. It was loaded and he showed her six extra cartridges, and said, "I intend to kill that d—n Henry Foster before to-morrow morning."

Levi Smith, for the defense, stated that he was one of those who were present and witnessed the homicide. His account of it coincided in substance with that of the State's witnesses, except that he said the deceased had approached within three feet of the defendant when the latter fired.

Ben Franklin, for the defense, stated that he also was present when the defendant shot and killed the deceased. He saw the deceased take a pistol out of his hip pocket and put it in the right hand pocket of his pants. Appellant said, "Boys, get out, I want to close; my orders are to close up." The deceased said, "You are getting d—n smart; you have got no edge for me, but I have a ticket

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for you." When this talk passed between them, the defendant was behind the bar, and started to turn down the lamp.

The statement of facts alleges in a general way that the witnesses agreed that the deceased had a pistol in his pocket when he was killed, and that he was a larger man than the appellant.

J. W. McNutt, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of murder of the second degree. There was but one error shown by the record. The other assignments are not well taken.

The court below charged the jury that: "If you believe from the evidence that defendant shot and killed Phillip Arnold, but you believe, at the time of the shooting, deceased was making an unlawful and violent attack upon defendant, that created in the mind of defendant a reasonable expectation of death or serious bodily injury from such violent and unlawful attack, and defendant *resorted to all other means to prevent the injury* except to retreat — for he was not bound to retreat, — then, if such unlawful attack was being made at the *very time of the shooting*, the shooting would be self-defense, and if you so find, you will acquit the defendant." The italics are ours.

This charge is radically wrong. If it reasonably appeared by the acts, or by words coupled with the acts, of deceased, that it was the purpose and intent of the deceased to take the life of defendant, or do him some serious bodily harm, defendant was not bound "to resort to all other means to prevent the injury," except to retreat. But on the contrary defendant had the right to slay him instantly without such resort. For if the life of the citizen is imperiled, the law does not require

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him to permit his life to remain in jeopardy for a moment, depending upon a successful resort to other, and of course, less effective means than the instant slaying of the aggressor. He may act at once, and with the most effective and deadly weapons.

When may he act or kill the aggressor? Not only at the very time the attack was being made, as was charged by the court below, but *after some act was done* by the deceased showing evidently an intent to take his life. We will not pursue this subject further, believing that it would be very uncertain whether the principles and distinctions set forth and drawn by the Code could be more forcibly and clearly enunciated than was done in *Kendall v. State*, 8 Texas Ct. App. 569. In this case, as in the *Kendall* case, and the cases of *Horback*, 43 Texas, 424, *Blake*, 3 Texas Ct. App. 588, and *Ainsworth*, 8 Texas Ct. App. 532, articles 570 and 572 of the Penal Code were confounded, and the provisions of the latter were injected into the former, and made to control the same. They are, by the Code, reason, and justice, essentially different,—setting forth rules and principles for the government of a state of case quite dissimilar in a great many particulars. This subject has also been handled in a masterly manner in the cases above cited.

The appellant moved for a new trial because of this error, the motion was overruled, and the same error is assigned in this court. *Bishop v. State*, 43 Texas, 390.

We are of the opinion that the charge was in direct violation of the Penal Code, and the court below should have awarded defendant a new trial. The judgment is reversed and the cause remanded.

Reversed and remanded.

Statement of the case.

S. SAGER v. THE STATE.

1. **THEFT — EVIDENCE.**— In a trial for theft, the alleged owner of the stolen property having testified that the defendant executed to him a bill of sale of it, the State's counsel asked him to state its contents. The defense objected, on the ground that the document itself was the best evidence of its contents. *Held*, error to overrule the objection and allow the witness to state the contents of the bill of sale.
2. **SAME.**— Cross-examining a State's witness the defense, for the purpose of showing his *animus* or impeaching him, laid the proper predicate and asked him if he had not told the defendant that he had been his friend but was then his enemy, and intended to have him prosecuted on the charge of theft involved in the pending trial. The State's counsel objected on the ground of irrelevancy, and the trial court sustained the objection. *Held*, error.
3. **PRACTICE.**— In the course of the trial the defense excepted to certain rulings of the court upon the evidence, and asked time to prepare proper bills of exceptions. *Held*, error to refuse the request.
4. **EVIDENCE.**— When the State has put in evidence a portion of a conversation between the defendant and another, the defense has the right to prove the whole of it on the same subject. In this case the prosecuting witness testified that on a certain occasion he accused the defendant of the theft, and the defense proposed but was not allowed to elicit the reply made by the defendant to the accusation. *Held* error; the ruling of the trial court cannot, under such circumstances, be sustained on the ground that declarations of the defendant were not evidence in his own favor.
5. **PETIT THEFT — PENALTY — VERDICT.**— Theft of property worth less than twenty dollars is punishable by fine and imprisonment in the county jail, or by such imprisonment without fine; but not by fine alone.

APPEAL from the County Court of Rains. Tried below before the Hon. E. P. KEARBY, County Judge.

A fine of one dollar was the penalty assessed against the appellant, on his conviction upon an information which charged him with the theft of a cross-cut saw worth four dollars, and a briar-hook worth one dollar and a half, alleged to belong to N. M. Woolsey but to have been taken from the possession of James Woolsey. The

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statement of facts and the bills of exception make up quite a voluminous record, but it is believed that for all practical purposes the opinion of this court sufficiently indicates the material facts.

H. W. Martin, for the appellant, filed an able brief and argument.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Numerous errors were committed on the trial of this case in the lower court, all of which are presented by bill of exceptions duly reserved and incorporated in the record.

1. Defendant was charged with stealing a saw and a briar-hook. The evidence disclosed that he had made a trade with one Nathan Woolsey for a pony, in part payment for which he was to let Woolsey have the saw and briar-hook. When the first State's witness was on the stand, he testified that defendant had executed a bill of sale for the articles alleged to have been stolen. Counsel for the prosecution asked him to state the contents of the bill of sale. Defendant's counsel objected on the ground that, if ownership of the property was sought to be established by the fact that title had been conveyed by a written instrument, the instrument itself was the best evidence. This objection was overruled, and the witness was allowed to testify as to the contents of the bill of sale. This was error.

2. One of the prosecuting witnesses being on the stand, defendant's counsel, after laying time, place and circumstances as a predicate, proposed to ask him if he had not made a certain statement with regard to the prosecution of defendant for the theft of these articles; the question being asked for the purpose of showing the *animus* of the witness towards defendant, and, in case of his denial, to introduce testimony to impeach him. The court re-

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fused to permit the testimony, and this constitutes error No. 2.

3. Defendant's counsel, having reserved several exceptions to the ruling of the court on the admission and rejection of testimony, asked of the court time to prepare his bills,— which was refused. The law is that, "On the trial of any criminal action the defendant by himself or counsel may tender his bill of exceptions to any decision, opinion, order or charge of the court, or other proceedings in the case, and the judge shall sign such bill of exceptions under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal." Code Crim. Proc. art. 686. In civil cases the rule is that, "whenever in the progress of a cause either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made, and at his request time shall be given to embody such exception in a written bill." Rev. Stats. art. 1358. Time should have been allowed defendant's counsel to prepare his bills of exception. The court erred in refusing it.

4. The 5th bill of exceptions shows an error in the exclusion of evidence similar to the 2d error above discussed; and for the same reasons the questions should have been admitted.

5. The 6th bill of exceptions shows an error of court in refusing to allow defendant to prove the whole of a conversation on the same subject whereof the State had been permitted to prove a part. Code Crim. Proc. art. 751.

6. A similar error, and for the same reasons, was committed in the exclusion of evidence as shown by the 7th bill of exceptions. The State, on the examination of Woolsey, her own witness and the alleged owner of the stolen articles, had drawn out part of a conversation between witness and defendant in which witness stated he

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had charged defendant with the theft. On cross-examination with regard to this conversation, defendant asked him to state what was the defendant's reply to the accusation of theft. On objection by the State the court refused to permit the evidence, for the reasons that the statements so made by defendant were not only self-serving declarations, but, having been made long after the offense was committed, defendant could not avail himself of them as evidence in his behalf. Self-serving declarations, it is true, that is, declarations made by a defendant in his own favor, unless part of the *res gestæ* or of a confession offered by the prosecution, are inadmissible as evidence for him. Whart. Crim. Ev. (8th ed.) § 690; *Harmon v. State*, 3 Texas Ct. App. 51. But the admissibility of the evidence here proposed did not rest upon that ground. Had the defendant proposed in the first instance to introduce these declarations, the objection might have been urged with great propriety, and would doubtless have been tenable. But here he was examining the State's witness on cross-examination with regard to his part in a conversation about which the State had examined partly her own witness. Such being the case, and the State having opened the door for its introduction by proving part of the conversation, defendant had the right to give in evidence the whole conversation upon the subject (Code Crim. Proc. art. 751), and the court erred in refusing to permit him to do so.

7. Again, the verdict and judgment were not in conformity to law. Defendant was being prosecuted for theft of property under the value of twenty dollars. The verdict was, "We, the jury, find the defendant guilty and assess his fine at one dollar," and judgment was rendered accordingly. It is provided by statute that "theft of property under the value of twenty dollars shall be punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to

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hard work, *and by fine* not exceeding five hundred dollars, or by such imprisonment without fine." Penal Code, art. 736. If found guilty, imprisonment is a necessary part of the punishment. There may be imprisonment without fine, but there cannot be fine without imprisonment, under such convictions. Exceptions to this rule of punishment relate to theft of property from the person, and to cases of any particular kind of property where the punishment is specially prescribed (Penal Code, art. 737), but this case does not come within the exceptions. *Fowler v. State*, 9 Texas Ct. App. 149.

8. The court erred in not granting defendant's motion for a new trial on the ground that the verdict and judgment were not supported by the evidence.

For the errors noticed, the judgment of the County Court is reversed and the cause remanded.

Reversed and remanded.

W. BRUMLEY v. THE STATE.

1. TRANSFERS FROM DISTRICT TO COUNTY COURTS.—The Code of Procedure, article 437, requires that the clerk of a District Court, in executing its order for the transfer of misdemeanor cases to the County Court, "shall accompany each case with a certified copy of all the proceeding taken therein in the District Court." Non-compliance with this requirement is available to the accused by plea to the jurisdiction of the County Court.
2. INDICTMENT—SURPLUSAGE—IDEM SONANS.—To an indictment for unlawfully selling liquor exception was taken because the word *drink* was written "dring," and the word *spirituous* was written "spiritous." *Held*, with respect to the former mistake, that it is cured by the context and the word itself is surplusage; and that, with respect to the latter, the error in the spelling does not vitiate and the principle of *idem sonans* applies.

APPEAL from the County Court of Johnson. Tried below before the Hon. W. J. EWING, County Judge.

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The conviction was for selling liquor on election day, and the punishment assessed was a fine of \$100. The opinion discloses all matters pertinent to the rulings.

W. Poindexter, and *De Berry & Smith*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. In transferring a misdemeanor for trial from the District to the County Court, the statute requires that the district clerk "shall accompany *each case* with a certified copy of all the proceedings taken therein in the District Court." Code Crim. Proc. art. 437.

In the case before us a motion was made to quash the indictment because it was not properly and legally transferred. The district clerk's certificate is identically the same as that given by the clerk in McDonald's case, 7 Texas Ct. App. 113, and which was held insufficient under the statute. In addition to the objections urged in McDonald's case, the bill of exceptions taken to the overruling of the motion to quash shows that this case was not *accompanied*, in the certificate of transfer, with a copy of the proceedings in the District Court. Indeed, no certificate at all accompanied the filing of this case in the County Court, and none was filed in this case until after the motion to quash was on hearing before the court. On the authority of McDonald's case, *supra*, the motion to quash, which was in the nature of a plea to the jurisdiction, should have been sustained, and the court erred in overruling it.

Another ground in the motion to quash was that the charge in the indictment was unintelligible. This charge was (omitting other portions not complained of) that appellant "did then and there unlawfully sell one certain *dring*, to wit, one certain half glass full of *spiritous* liquors, to one D. W. Robinson, said drink of spiritous liquors not being then and there sold at a drug store," etc.

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The objection is as to the spelling of the two words we have italicized. If any doubt arises on the meaning of the word *dring*, that doubt we apprehend will be entirely removed when the reader reaches that portion of the sentence,—said drink of spiritous liquors,” etc. But, if necessary, the word *dring* might and could be eliminated from the charge as surplusage and the charge still be sufficient, for it would then charge the selling of “one certain half glass full of spiritous liquors.”

As to the spelling of the word spirituous, bad spelling will not vitiate an indictment; and, besides, as spelt the word is *idem sonans*.

For the error above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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BUD HAMILTON *v.* THE STATE.

1. NOCTURNAL BURGLARY WITH INTENT TO RAPE—INTERPRETATION OF THE CODE.—The Penal Code, article 704, makes it burglary to enter a house at night by force, threats or fraud, with intent to commit felony or theft, and further provides (in article 706) that the entry into a house, within the meaning of article 704, “includes every kind of entry but one made by the free consent of the occupant,” etc. *Held*, that this latter provision is not to be so construed as to eliminate from the definition of the offense the element of “force, threats, or fraud,” nor to dispense with the necessity of alleging and proving that the entry was effected by some one or more of those modes. It does not suffice, therefore, to allege and prove an entry made without the consent of the occupant or of some one authorized to give consent; but some one of the statutory modes of entry, as well as the fact of entry, must be alleged and proved in order to constitute the offense. Note in the opinion a collocation of the articles of the Penal Code which affect this question, and the elucidation of their import and interdependence.
2. SAME—ENTRY EFFECTED BY FRAUD.—Appellant was convicted of burglary on an indictment which charged a nocturnal entry effected by fraud. The evidence relied on to prove the entry and fraud

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tended to show that he took off his shoes and entered through an open door, without the consent of anyone. *Held*, not sufficient to prove that the entry was effected by fraud.

3. **SAME—WITH INTENT TO COMMIT A RAPE BY FORCE.**—The intent alleged was to commit a rape by force, and the evidence relied on to prove it tended to show that one of the three females in the house was awakened by something touching her foot, and, screaming, saw a man running away through an open door, *Held*, not sufficient to prove the intent alleged.

APPEAL from the District Court of Gonzales. Tried below before the Hon. EVERETT LEWIS.

The indictment charged that appellant, on July 20, 1880, in the county of Gonzales, and State of Texas, with force and arms did “unlawfully, feloniously and burglariously, about the hour of eleven o’clock at night of said day, enter by fraud the dwelling house of Mistress Ernstiene Gercheidle, there situate, with intent then and there unlawfully, feloniously and burglariously, and against the will and consent of Ernstiene Gercheidle, to ravish and carnally know, by force and by assaulting, the said Ernstiene Gercheidle; contrary,” etc. The jury found the appellant guilty, and assessed his punishment at a term of seven years in the penitentiary.

The statement of facts is unusually concise, and will be found embodied in the opinion of this court. The charge given to the jury set forth the substance of the principal provisions of the Penal Code in the definitions of burglary at night and in the day-time, of rape, and of assaults, and then proceeded as follows: “5. If the jury find the defendant guilty, as charged in the indictment, of entering the house with intent to commit the offense of rape, as charged in the indictment, either by force, threats, or fraud, they should assess his punishment at confinement in the penitentiary for a term of years not less than two nor more than twelve.” The remainder of the charge expounded the presumption of innocence, the

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functions of the jury as the judges of the evidence, and the doctrine of reasonable doubt.

At the instance of the defense, the jury were further instructed in substance that, to convict, they must believe beyond a reasonable doubt that the defendant, and no other person, entered the house as charged; that they must also believe that the entry was with the intent of committing the crime of rape as defined in the main charge; that, if they believed the entry was made for any other purpose than to rape, they must acquit, and if they had a well-founded doubt as to the defendant's intention they must acquit; and that they must believe, beyond a doubt, that he entered and committed the assault for the purpose of committing rape on Mrs. Gercheidle and no other person.

The court refused an instruction requested by the State to the effect that the entry of the house with the intent to rape was the gist of the offense, and would suffice whether the defendant, after entering the house, did or did not assault the lady.

The defense requested the following instructions:

"1. By fraud is meant some device or artifice employed to gain admission into the house as alleged in the indictment, and unless you find that fraud was practiced in said entry you must acquit the defendant.

"2. The jury are not permitted to presume what the defendant's purpose was in entering the house, but must find from the evidence introduced what the intention was; and if you have a doubt arising from the evidence as to the true intention of said defendant, then you should acquit the defendant."

These instructions were refused on the ground that the charges already given were sufficient.

No brief for the appellant has reached the Reporters.

H. Chilton, Assistant Attorney General, for the State.

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HURT, J. The appellant was convicted of burglary. Hamilton was charged by the indictment with entering a house by fraud, with intent to rape by force. To sustain the conviction each of these allegations must be proved, namely, 1st, that the house was entered at night by fraud; 2nd, with the intent to rape by force.

As the door of the house was open, the first question presented is, was the house in such a condition as to be susceptible of burglary, by entering by *threats* or *fraud*? We think so. But not by force. Suppose the occupant had been near the door, though open, and the would-be burglar deceived him, pretending to be some one else, known to occupant to be friendly or harmless; or suppose, when met or seen at the door, he threatens the occupant, and by means of the threat an entry was obtained. In these cases the fact that the door of the house was or was not open is of no consequence; the entry would be made in one of the modes denounced by the Code.

But if the entry is not made by threats or fraud, being obtained by force, what is meant by the term *force*, the entry being at night? To the writer this is a troublesome question indeed. Art. 704, Penal Code, defines burglary to be the entering a house by force at night with the intent of committing felony or theft. We have eliminated from the definition "threats, fraud and the entry in the day time and remaining concealed," etc., with a view of narrowing and presenting the very point of discussion. If A. enters a house at night by force, with intent to commit a felony or theft, he is guilty of burglary. The elements are, entering a house at night by force to commit felony or theft. What is meant by the term "by force?" Is it not an essential element? Suppose that an indictment for burglary should charge that A. did enter the house at night of a certain person, naming him, without the free consent of said person or occupant

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(omitting "by force"), with intent to commit felony or theft, would such an indictment be sufficient? It must be remembered that threats, fraud, and entering in the day time are not in the case, nor are we discussing the necessity of setting forth the constituent elements of the intended felony or theft. The term "by force" is the subject-matter or question under consideration.

By art. 705 he is also guilty of burglary who, with intent to commit a felony or theft, by breaking enters a house in the day time. Under art. 704 an entry *by force* will suffice, but under art. 705 an entry by breaking is necessary,—the reason the former being at night, and the latter in the day time. This would be satisfactory if it were not for the provisions of articles 706 and 708. Art. 706 provides: "The entry into a house, within the meaning of art. 704, includes every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent; it is not necessary that there should be any actual *breaking*, . . . except when the entry is made in the day time." It plausibly appears from this article that an entry without the free consent of the occupant, etc., if at night, would answer, *without force*; and, if in the day time, an entry by *actual breaking* is necessary. But the conclusion that an actual breaking in the day time is required is not correct, for article 708, which defines "breaking" as used in article 705, provides that "the slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of the door that is shut, or by raising a window, the entry at a chimney or other unusual place, the introduction of the hand, or any instrument, to draw out the property through an aperture made by the offender for that purpose." That force which is required to raise the latch of a closed door constitutes a breaking,—not all the modes of breaking,—under arts. 705 and 706, when the entry is made in the day time.

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If, then, the slightest force equals and constitutes not only breaking, but actual breaking, when the entry is made in the day time, what character or degree of force is necessary if the entry is made at night? Indeed, is there any degree of force required? Will not an entry at night without the free consent of the occupant be sufficient? Will not an indictment which charges an entry at night without the free consent of the occupant be sufficient?

Before answering this question, let us take a close view of these articles. They must be construed together, and made to harmonize, if possible. The object of each must not be lost sight of. Articles 704 and 705 define the offense. Articles 706 and 707 define entry. The object and purpose of these two articles is to define and illustrate that which constitutes an entry; the subject-matter upon which the mind of the legislator is acting and about which he is speaking being entry, and not force. Neither of the articles, to wit, 706, 707 and 708, pretends to treat of the term "by force," used in article 704. Article 708 discusses the subject of breaking, but does not refer to art. 704 at all. We therefore submit that, if there is no attempt made anywhere in the Code to define, modify or alter the ordinary legal meaning of the term "by force," it should remain just as we find it in art. 704. We are supported in this position by a number of considerations.

Burglary is composed, 1st, of entry; 2d, the means resorted to to effect the entry; 3d, the purpose or intent of the entry. And we find authors, and Supreme Courts in their opinions, treating at great length each of these subdivisions as separate and distinct matters. They propound the subjects. What is an entry; what is a breaking; what devices will amount to fraud, and what character of threats, etc. In the discussion of this subject not much light can be drawn from the common law, nor the decisions of other States, because burglary as de

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fined by our Code omits breaking except when committed in the day time, while the common law and the statutes of some of the States require the entry to be made by breaking, or define the offense differently from ours. At common law burglary is the breaking and entering the dwelling house of another in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. Here, we see from the language used, an actual breaking would be necessary; but this is not the case, for, if an entrance were made by some trick or device, this is considered a constructive breaking, and so with threats, violence and so on. We are not driven to make these violent and latitudinous constructions, for our Code provides that, if at night the house is entered by *force*, *threats* or *fraud*, with certain intents, burglary is complete. It will be seen, however, that if the house is entered in the day time with like intent, to wit, to commit felony or theft, the entry must be by breaking; an actual breaking is not, however, necessary,—the slightest force will suffice.

But, to return: we have found that entry and the means of entry are distinct, and are so considered by law. We have also shown that the several articles of the Code explain entry and breaking, but do not attempt to define, modify or explain the term “by force.” We cannot thereupon take the explanation of the terms entry, breaking, and force them upon, and permit them to control and destroy, an essential element of the offense. The term “by force” must stand unless the indictment charges fraud or threats.

There is another consideration which, we think, is conclusive in the matter. The Code declares that burglary is constituted by entering a house by force, *threats* or *fraud*, at night, etc. If the party is guilty of a burglarious entry when he enters at night without the consent of the occupant, why does the Code allude in any manner

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to force, threats or fraud? The Code should have defined the offense as follows: Burglary is constituted by entering a house at night without the free consent of the occupant, or of one authorized to give such consent, with intent, etc. So far as the point of discussion is concerned, this would have been proper, and, to prevent a vast amount of confusion, absolutely demanded, if, indeed, an entry without the consent of the occupant was all that was necessary. We cannot believe that the Legislature of our State ever intended such an interpretation, nor that it is justly chargeable with such confusion. If we keep close in view the objects of each article, and give force and effect to each, this seeming confusion will disappear.

We therefore conclude that to constitute burglary at night, or in the day time, the entry must be by force, and to enter an open door at night, when the charge is *by force*, would not constitute the force required in the Code. If there was the slightest force necessary to effect the entry, this will suffice. To illustrate: Suppose the door is shut or slightly open, but not sufficient to admit the party, and he open it and enter; here there would be force, and the Code satisfied. We are treating of burglary at night. If, however, an entry is made at an unusual place, no force is necessary. We have thought proper to give to this subject a somewhat lengthy notice, because of the seeming conflict in the different articles in regard to this offense. The subject, however, is not exhausted.

We now return to the charge in this indictment. The entry is alleged to have been made by fraud. The evidence shows that defendant Hamilton removed his shoes from his feet, and entered at an open door. Did the fact that defendant removed his shoes constitute the fraud by which he obtained an entrance into the house? Who was deceived or imposed upon by this act? There was no necessity of resorting to fraud to effect an entrance; the

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door being open, there was nothing to prevent his entering the house. The natural inference from this fact is that the defendant removed his shoes to prevent detection, and not for the purpose of deceiving or imposing upon the occupant, and thereby effect an entrance. That allegation is utterly unsupported by the evidence.

The indictment charges that defendant entered the house with intent to rape Mrs. Gercheidle, by force. Is this allegation supported by the evidence? We here give all the evidence, which is: "That in July, 1880, in the town and county of Gonzales, State of Texas, the defendant, Bud Hamilton, who was identified, was seen coming from the direction of Mrs. Gercheidle's house, about eleven o'clock at night. That he was halted, and found barefooted, with his shoes on his arm. That a light was procured and the track of defendant traced to the back door of Mrs. Gercheidle's dwelling house, from where defendant was arrested. It was further proved that the inhabitants sleeping in said house consisted of three men and three women; that they were awakened by Mrs. Gercheidle's screams, a few minutes before defendant's arrest; and at the time of the arrest members of the household were out hunting for the intruder. That Mrs. Gercheidle was awakened by something touching her foot, and, as she opened her eyes, screaming, she saw a man running out of the back door, in a stooping posture. That she could not identify the individual, as she only saw his back, and no other member of the household saw anyone in the house at the time. That the doors and windows were all open, and that the moon was shining brightly. That defendant did not have her consent to enter said house, nor that of any other member of the family. That the house is situated in the town and county of Gonzales, and is the dwelling house of Mrs. Gercheidle, as charged in the indictment."

The charge is that defendant entered by fraud, with

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intent to rape by force. The jury found defendant guilty; thus declaring the above allegation to be true, and so found upon the above evidence. The court refused to grant a new trial. If there is the minutest circumstance tending in the remotest degree to indicate the intent with which defendant entered the house, we are too obtuse to perceive it. Mrs. Gercheidle was awakened by something touching her foot. Who touched her foot?—was it defendant? If so, was it intentional or an accident? With what intent (if intentional) did he touch the foot?—was it to rape, or carnally to know her with her consent? If to rape, was it to be effected by force, threats or fraud? If the touching was accidental, then what was the purpose of the defendant in entering the house? There were two other women in the house; did he not enter to rape one of them? For, if the touching of the foot of Mrs. Gercheidle was accidental, there is nothing to indicate her as the object of the entry. May he not have entered for the purpose of indecent proposals to one of the other ladies, or for the purpose of theft, murder, assault to murder—in fact, with intent to commit one or all of the felonies known to the law, which could have been committed in that house? We cannot answer, nor do we think any juror on earth can answer any of the above questions from the evidence. If he entered with intent to commit a felony, there is but one felony which we may with safety deny that defendant intended to commit, and that is the very one for which he is convicted, to wit, the entering the house with intent to rape Mrs. Gercheidle by force; for no one, unless he be a driveling idiot, ever expected to rape a woman *by force* without expecting her to resist; not only to resist, but to scream and continue to scream until overpowered, or suffocated by the ravisher. How was it with the defendant when the issue was presented—the very one which he knew would arise? He broke and rushed from the lady whom he in-

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tended to ravish *by force*? The evidence not only fails to support the charge that defendant's intent was to rape by force, but there is no evidence to point to the offense (if any) for which he entered the house.

To constitute burglary the house must have been entered with intent to commit felony or theft. The evidence in this case fails to indicate a felony. If felony, what felony? On the contrary, if the purpose was unlawful, we would presume the commission of a misdemeanor, rather than felony. Why? Because a great many more misdemeanors are committed than felonies; and for another reason,—“all presumptions are in favor of the defendant, when left to presumption.” We are therefore of the opinion that the verdict of the jury is wholly unsupported by the evidence.

The court charged a great many abstract propositions of law germane to the subjects of burglary and rape. We would respectfully but most earnestly suggest that the charge be confined to the allegations in the indictment.

For the errors above noticed, the judgment is reversed and cause remanded.

Reversed and remanded.

TOM BOSTICK *v.* THE STATE.

EVIDENCE — PRACTICE.—The Code of Procedure, article 661, directs that testimony shall be allowed at any time before the argument is concluded, if it appear “necessary to the due administration of justice.” Within the purview of this provision testimony to discredit a material witness of the adverse party, by proving his conflicting statements, may well become “necessary to a due administration of justice,” even though it be cumulative; and the fact that it was not offered in its regular order is not a sufficient reason for its exclusion.

Statement of the case.

APPEAL from the District Court of Colorado. Tried below before the Hon. EVERETT LEWIS.

The indictment charged that the appellant, on November 23, 1879, did willfully, feloniously and maliciously set fire to a certain store-house and dwelling, the property of William Munch. This is the second appeal from convictions which concurred in assessing a term of ten years in the penitentiary as the punishment. In volume 10 of these Reports, at page 705, the report of the case on the former appeal will be found. The trial which resulted in the present appeal was had at the Fall term, 1881, of the District Court of Colorado county.

W. Munch, for the State, testified that between three and four o'clock in the morning of November 23, 1879, his store-house, warehouse and dwelling, which adjoined each other in the town of Alleyton, Colorado county, were destroyed by fire. Witness and his wife had barely time to escape, without their clothing. Some time before the fire the witness had made a complaint against appellant for stealing candy, and subsequently the appellant met him in the road and struck him with a stick, and threw a brick-bat at him. Witness was up until about one o'clock the night of the fire. Some men, white and colored, were playing cards in the warehouse, which stood between the store and the dwelling. They were not playing by candle-light, but had a railway lantern. When witness went to bed no lights were burning. There was no moss nor any rags in the wareroom at that time.

Cayene Foster, a freedwoman, testified for the State. She stated that she saw the fire when Munch's houses were burned. The light of the fire shone in at her window, and when she awoke and discovered the fire, which was north of her, it had burned a good deal. She looked over there and saw the appellant. She lay in her bed and hallooed "fire," and kept up that cry. Appellant

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then walked off up the street in a north direction. Witness thought the fire started at the south end and on the outside of Munch's buildings. It illuminated her room so that you could have picked up a pin there.

On her cross-examination the witness stated that the appellant had on a hat and dark pants, and was standing and looking at the fire. Being asked if she had not stated at the former trial that she recognized the appellant by the light of the moon, she first replied that she did not know whether she had or not, but afterwards denied that she had so stated. Her present statement was that she saw him by the light of the fire. She did not go to the place of the fire until it was over. When the case was formerly tried Mr. Munch gave her five dollars, to pay her expenses while at court and on her way back to her home in an adjoining county. There was a fence between the fire and the house occupied by her when she saw it, but she could see the appellant plainly through the fence, and was positive in her identification of him.

Two or three witnesses for the State testified to threats made by the appellant, within a short time before the fire, that he would kill Munch and that he would burn him up.

The defense introduced Riney Beverly, who testified that she was at Munch's house about eleven o'clock the night of the fire. She went there to find her husband, and saw a crowd gambling in the warehouse, which was lighted up with candles. Rags and moss were in the room. She heard the State's witness Foster testify at the former trial, and on that occasion state that she, Foster, saw the fire when it was just starting, and saw Tom Bostick by the light of the moon.

Mrs. Smith, for the defense, testified that she lived in Alleyton at the time of the fire on Munch's premises, and was then a widow and living alone. Appellant's mother

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lived just in the rear of witness's garden. Witness was awake most of the night with a sick child. People were riding by and making noises which frightened her, and she heard the cry of "Fire." She took her little girl and went to the house of appellant's mother, and found there the mother of appellant and some children. This was about three o'clock, or between three and four, and she stayed there till day. Some one was lying on the floor, covered up. She asked appellant's mother who that was, and she replied that it was Tom Bostick, the appellant. He did not get up while witness remained there.

Julia Bonds, for the defense, testified that she was the mother of the appellant, who was about eighteen years old at the time Munch's premises were burned. Witness lived in Alleyton at that time, and when she heard of the fire she called her two sons, Jim and the appellant, who were sleeping on the floor. Jim got up just as Mrs. Smith came in; Tom, the appellant, did not get up. He had been out hunting that night with E. Goodings, who had since been killed by the railroad cars. On cross-examination the witness stated that Tom came home about half past one that night.

W. S. Delaney, Esq., testified that he heard the deceased witness Goodings testify at the former trial, to the effect that, on the night of the fire, he and the appellant went out coon-hunting, caught some game, and came back to Alleyton about one o'clock, when they separated and each went to his home.

The defense proved that the Alleyton blocks were two hundred and fifty feet square; that Munch's tenements were on the northeast corner of a block, and the house of the State's witness Foster on the corner of an adjacent block and opposite the southwest corner of the block on which Munch's buildings were situate; and that Foster's house was surrounded with a high fence constructed of planks set on their ends.

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The opinion discloses the special matters involved in the rulings.

W. S. Delaney and George McCormick, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. This is a second appeal from a judgment of conviction in this case, the punishment being assessed each time at imprisonment in the penitentiary for a period of ten years. See *Bostick v. State*, 10 Texas Ct. App. 705. As in the former appeal so in this, the statement of facts shows that the evidence of the State's witness Foster "was the strongest, most pertinent and pointed evidence adduced against the defendant upon the trial." In the only bill of exceptions appearing in the record we find, "that the witnesses were, on motion of the district attorney, placed under the rule, and after the State had introduced her witnesses in chief the defendant introduced his and rested; and the State then introduced witnesses in rebuttal, when, before the argument of the case had commenced, the defendant offered to introduce Mr. Kennon, Esq., an attorney engaged in the prosecution of the case, and who had represented the State on the former trial hereof, had at the spring term, 1881, of this court, and offered to prove by said witness Kennon that the State's witness Cayene Foster testified on the trial of this cause when last on trial that she recognized the defendant Bostick by the light of the moon,—that it was a bright moonlight night, and the fire was just beginning fairly to burn," etc. On her cross-examination when on the stand, the witness Foster had been asked by defendant's counsel if she had not stated at the last term of the court that she recognized Tom Bostick by the moonlight, and she had answered that she had not so stated. The court refused to permit defendant to make the proof proposed as above by the witness Kennon, and in expla-

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nation of the reasons for his ruling says,— “The testimony offered was of the same character and effect as that testified to by Riney Beverly, a witness for defendant, before the State offered rebutting testimony, and the testimony was cumulative and not in order or deemed necessary to the ends of justice.” Riney Beverly had testified that she had “heard the witness Foster testify at the last term of this court in this case; she then said she saw the fire when it was just starting and saw Tom Bostick by the light of the moon.”

The question is, was the evidence admissible, and were the reasons of the court for refusing it correct and satisfactory? Foster being the main witness for the prosecution in identifying and connecting defendant with the time and at the place of the burning, it was of vital importance to defendant, could he do so, to weaken or break down her testimony by showing that she had made conflicting statements with regard to the matter. This mode of impeaching a witness is a common practice, and it is oftentimes a most effective method of destroying the evidence of an adverse or hostile witness. It is elementary in fact that “a witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statement on trial, provided such statement be material to the issue.” Whart. Crim. Evid. § 482. And we are not aware of any rule which inhibits cumulative evidence as to the disputed fact. On the contrary, in many instances the more evidence the impeaching party could adduce, the greater likelihood of his establishing the proposed contradiction. Nor was it a sufficient reason for refusing the introduction of the evidence that Riney Beverly, the defendant’s witness, had testified to the same fact. One impeaching witness may confuse the mind as to what to believe, whereas two, three or four others concurring may confirm the matter and give belief a sure foundation to

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reject the evidence of the disqualified witness from the case. *Wofford v. State*, 44 Texas, 439; *Butler v. State*, 3 Texas Ct. App. 48.

If the evidence was legitimate, and if it was important to the defendant, then the fact that it was not introduced in its regular order was no sufficient reason for its rejection under our statute, which requires that "the court shall allow testimony at any time before the argument is concluded, if it appear that it is necessary to a due administration of justice." Code Crim. Proc. art. 661.

We are of opinion that the court erred in excluding the evidence, and the judgment is reversed and the cause remanded.

Reversed and remanded.

LEE HILL v. THE STATE.

1. THEFT — INDICTMENT — ALLEGATION OF OWNERSHIP.— If one person has the ownership of the property and another has the possession, charge, or control of it, the ownership may be alleged in either.
2. EVIDENCE — CONFESSIONS.— In a trial for the theft of a horse the only evidence inculpatory of the accused was a confession imputed to him by the prosecuting witness, who, being the half-brother of the accused, justified his unnatural attitude by a desire to separate the accused from evil associates. The testimony of this witness was contradictory in various particulars of his own deposition at the examining trial, and material statements which he ascribed to the accused were inconsistent with the evidence of other witnesses. Aside from the putative confession, the only proof of the *corpus delicti* was the fact that the animal was missed from a certain field; and, on the other hand, there was proof that it was repeatedly seen on its accustomed range soon after its disappearance from the field. *Held*, that evidence proved neither the *corpus delicti* nor the culpability of the accused. Note the comments made upon it in the opinion.

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APPEAL from the District Court of Gonzales. Tried below before the Hon. EVERETT LEWIS.

The indictment charged the appellant with the theft of a horse, the property of Fannie Kellman, from her possession, on March 1, 1881. Being found guilty by the jury, they assessed his punishment at a term of five years in the penitentiary.

Mrs. Fannie Kellman, the alleged owner of the animal, was the first witness examined by the prosecution. It appears by her testimony that she was the wife of Phillip J. Kellman, and that, on some undisclosed accusation, he was committed to jail about three months before the alleged theft. Previous to his arrest he estrayed the horse in question, and when he was put in jail he "turned over to" the control and management of the witness the same animal. She was absent from home at the time, and requested her father, W. S. McAda, to look after the horse for her.

R. R. Jewell, the principal witness for the State, testified that he was twenty-seven years old, and was a half-brother of the appellant, who was not quite twenty-one. The parents of the appellant were dead, and he was brought to Gonzales county by the witness, about three years before the trial. About two weeks after Mrs. Kellman's pony was stolen, the appellant came to where the witness was herding sheep, near Sid Billings's, and, after some desultory conversation, he remarked that Fannie Kellman had lost her pony; to which the witness replied that he supposed the Mexicans had taken it. Appellant smiled and said "No," and the witness then asked him if he knew anything about the pony, and he replied that the Mexicans didn't get it. He then said that he had got the pony; that after old man Kennedy (with whom appellant seems then to have lived) had gone to bed and got quiet, he (the appellant) got up and went into W. S.

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McAda's field and caught the pony, and took it to a thicket on Long Hollow, and tied it in the thicket until Jim Pearce Wright's herd came along, next morning, and then he turned the pony loose in the said herd and Wright took it west; and that he, the appellant, had received from Wright a good saddle in return for the pony. This confession, the witness said, was made to him voluntarily by the appellant, and without threat or inducement. There was no other person present.

On the cross-examination the witness denied that he had tried to get the appellant to leave the country because he, the witness, had forged a bill of sale to an estray and had asked appellant to witness it,—which the latter refused to do. Witness said he tried to get appellant to leave the country, to get him away from the company of bad men who were leading him into trouble; that he also tried to get the appellant a situation with Dock Burnett, to drive cattle to Kansas, but had never tried to get him to leave for fear he would testify against witness about a forgery. Witness denied forging any bill of sale, and said he knew nothing about such a forgery. The reason that he prosecuted the appellant for stealing this horse was to get him out of and away from this country on account of his association.

In the further course of the cross-examination the witness denied that he had testified at the examining trial that the appellant, in conversation about the horse, did not state where he had turned the horse loose or where it went when it was turned loose; and the witness also denied that on the same occasion he testified that the appellant did not state whether it was night or day when he hemmed the horse in the field; and denied further that he stated at the examining trial that the appellant got excited when he was asked by the witness whether he, the appellant, took Fannie Kellman's horse. The record of the examining court contradicted these denials of the

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witness; with regard to one of which, however, he explained that the appellant told him he got the horse after they had gone to bed at old man Kennedy's, and after they had gotten quiet, and that he, witness, concluded it was at night. The testimony of the witness at the examining trial, as shown by the record put in evidence by the defense, concluded as follows: "R. R. Jewell, recalled for the State. In answer to question 'What did defendant tell you in the conversation about getting a horse for the one hemmed up in McAda's field?' witness says defendant said he got a good one."

R. J. Kennedy, Sr., for the defense, testified that the appellant slept at witness's house the night the horse was stolen, and witness saw him go to bed about eight or nine o'clock that night, and saw him again between four and five o'clock the next morning, but not between those times. Witness remarked to him, "Lee, you are turning in early to-night." Jim Pearce Wright penned his herd of cattle at witness's house that night. Appellant helped Wright off with his cattle the next morning, but did not go further than around in sight of the house,—about 300 yards. Appellant came back and witness sent him off after a horse, and saw no more of him until dinner. He started south after the horse, and kept that course as far as witness could see him, whereas Wright's herd went nearly west. From witness's house to McAda's the distance is about half a mile, and to the nearest point of McAda's field it is 600 yards. Between witness's field and McAda's there was nothing but a cross fence. It is a mile from witness's house to the nearest point on Long Hollow, and a mile and a quarter to where Wright's herd crossed Long Hollow.

G. B. Kennedy's testimony at the examining court in behalf of the defense was put in evidence. According to it the witness, the appellant, and several others stayed out at Wright's camp until eight or nine o'clock of the night in

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question, and about that time of night the witness and the appellant went into old man Kennedy's house, and the appellant undressed and went to bed in the room where the witness slept. It commenced to rain, and witness, who had a mare roped up, told the appellant to get up and go with him into the field, to turn the mare loose. Appellant asked Charley Kennedy to go with witness in his place, and when witness and Charley came back, in about twenty minutes, the appellant was in bed and seemed to be asleep, and was there when the witness got up the next morning. Appellant and the witness helped Wright make a start with his herd, and then returned. Appellant had no chance to handle a horse during that day.

It was an agreed fact that the horse in question ranged in the fork of the Guadalupe and the San Marcos rivers before he was estrayed by Kellman.

B. M. Lemmond, for the defense, testified that about the day laid in the indictment he saw, some half a dozen times, a bay pacing pony about eight miles north of McAda's field, and on a line from it to the forks of the Guadalupe and San Marcos rivers. It was an estray in that neighborhood. The witness delineated the brand which was on the animal.

The defense showed by the record of estrays that the animal estrayed by McAda was a bay pony horse, and bore the same brand as that delineated by Lemmond.

After verdict the defense filed a motion for a new trial, which was overruled, and exception was reserved.

Fly & Davidson, for the appellant, filed an able brief and argument.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Philip Kelman estrayed the animal charged to have been stolen some time in 1880. He was arrested

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and placed in jail on the 1st December, 1880, and has remained therein ever since. When arrested "he (to use the language of Mrs. Kelman) turned the horse over to my control and management by express agreement." Mrs. Kelman left her home for a short visit, asking her father "to look after the horse for her."

The indictment charged that the horse belonged to Mrs. Kelman. The defendant objects that there is a failure of proof on this allegation: 1st. That, from the evidence, Mrs. Kelman is not the owner of the horse; and 2d. The property should have been laid in Philip Kelman, and not in Mrs. Kelman. To this we cannot agree; for if one person owns the property and another has the possession, charge, or control of the same, the ownership may be alleged in either. Art. 426, Code Crim. Proc.

The controlling question in this case is the sufficiency of the evidence to sustain the conviction. (The reporters will give the evidence.) The only witness whose evidence tends to connect the witness with the offense, if an offense was committed, is one R. R. Jewell, a half-brother of defendant. It seems that defendant is about twenty-one years of age, without father or mother, and that he has been under the fostering care and control of his half-brother, the witness. This half-brother swears that, "about two weeks after Fannie Kelman's pony was taken, defendant came to where I was herding sheep, near Sid Billings's, and after some desultory conversation defendant remarked "that Fannie Kelman had lost her pony. I replied yes, I suppose the Mexicans have taken it. He smiled and said no. I then asked him if he knew anything about it, and he said the Mexicans did not get it. He then said or told me that he got the pony; that after old man Kennedy's family had gone to bed and got quiet he got up and went into W. S. McAda's field and hemmed up the horse, and caught him and took him to a thicket on Long Hollow, and tied him in the thicket until

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Jim Pearce Wright's herd came along next morning, and he then turned the horse loose in said herd, and Wright took him west; and defendant received from Wright a good saddle in return for the pony. The confession was voluntarily made to me by defendant, without inducement or threat on my part. Bascom McAda had given Brazzel Kennedy authority to get this pony out west, and had given him the brand to look for. There was nobody present when defendant and myself had this conversation. Defendant's counsel asked witness if he did not try to get defendant to leave the country because witness had forged a bill of sale to an estray horse, and wished defendant to witness it for him and defendant refused. Witness answered he did not, but tried to get the defendant to leave the company of bad men who were leading him into trouble; also tried to get defendant a situation with Dock Burnett to drive cattle to Kansas, and did not try to get him to leave for fear he would testify against him about said forgery. Witness said he did not forge the bill of sale, and knew nothing about it; also testified that the reason he, witness, prosecuted defendant for stealing this horse was to get him, defendant, out of and away from this country on account of his association," etc.

From the sworn testimony of this witness, his object was not to get defendant out of the country to prevent him from proving the forgery, but, prompted by the loving regard of a kind relative, he desired to snatch him from his depraved and villainous associates. These must have been of the basest sort, indeed, for he verily believed that the inmates of the penitentiary would be an improvement, with whom it was his loving desire to place his half-brother. To this he directly swears. This may be true, but we will not believe it, nevertheless. The eternal law of our nature revolts at such a proposition. His half-brother's associates were very bad; to reclaim

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him he sent him to the penitentiary. How a sensible jury could have given credence to this witness we cannot understand. This court will never consent to a verdict and judgment the result of which is the incarceration and infamy of a citizen upon the evidence of such a kind and considerate brother, unless corroborated by cogent facts. Is he corroborated? Not in the slightest degree. He is not only uncorroborated, but self-contradicted in a number of facts, as shown by his evidence before the committing court,—contradicted and impeached by his own record.

On the other hand, when we look to the evidence of the other witnesses, the guilt of the defendant is rendered very improbable. The horse was taken from McAda's field near old man Kennedy's, if taken at all. By the old man and his son defendant was seen to have gone to bed that night at Kennedy's, and was seen as late as eleven o'clock at night, and between four and five o'clock next morning. This was the night the horse was said to have been taken. G. B. Kennedy testified to the fact that he helped Jim Pearce Wright drive his cattle out near Chandler's and then turned back; defendant had no chance to handle the horse during the day. Before being estrayed, the horse's range was in the forks of the Guadalupe and San Marcos rivers. He was missing on the 14th of February, and was seen by the witness Lemmond in March, a half dozen times, about eight miles north and between McAda's and the forks of the above named rivers. There is no evidence that the horse was taken by any person, save the fact of his being missing. Mrs. Kelman was not at home when this occurred. Old McAda was inquiring after the horse next morning. These facts show evidently that, if taken by any person, these witnesses knew nothing of the fact further than that he was not in the field. To convict on the confessions of a defendant the *corpus delicti* must be shown *aliunde*. It cannot be done by

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confessions. There was no attempt by the State to prove the *corpus delicti*. McAda was not introduced as a witness at all. But, concede the *corpus delicti*, there being no evidence tending to connect defendant with the theft, save that of R. R. Jewell, and his coming in such a questionable shape, being uncorroborated, conflicting, contradictory and stultifying, we are not willing that this judgment should stand.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

SIMON BAILEY v. THE STATE.

1. MOTIONS FOR REHEARING are required by the Code of Procedure to be filed within fifteen days after the rendition of the judgment, unless the court sooner adjourns, in which case the court is empowered to regulate the matter. If the court does not adjourn within the fifteen days, it has no jurisdiction to entertain a motion for rehearing filed after the lapse of that period. But the authority of the court to correct clerical errors and the like, and to entertain proceedings for the enforcement of its judgments, is not thus restricted.
2. JEOPARDY.—Pendency of other indictments for the same charge is not jeopardy, nor is it in any way available to the accused until he has been put in jeopardy under one of them. He cannot require that the State elect upon which of the indictments it will proceed.
3. PRACTICE.—Objection that the minutes of the court fail to show that the indictment was presented by a grand jury of the proper county must be made before verdict.

APPEAL from the District Court of Brazoria. Tried below before the Hon. W. H. BURKHART.

The conviction was for rape of a little girl. She and the appellant were negroes. A term of twenty-five years in the penitentiary was the punishment assessed.

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H. E. Vernor, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The judgment of the District Court was affirmed by this court on the 8th day of May, at the late Austin term. On the 29th day of June, 1881, and after the adjournment of the court at Austin, application was made to the writer, as one of the judges of this court, for permission to file a motion for rehearing, which was granted with a view that the question of practice in such case might be considered and definitely settled, as it had frequently been discussed by the profession, and no adjudication had been previously made directly with regard to it. The motion was filed on the 30th day of June, more than fifteen days after the rendition of judgment by this court.

An examination of the matter has satisfied us that the filing of the motion, under the circumstances, was without authority of law. Article 1051, Revised Statutes, provides that "Any party desiring a rehearing of any matter determined by said courts may, within fifteen days after the date of entry of the judgment or decision of the court, file with the clerk of said court his motion in writing for a rehearing thereof, in which motion the grounds relied upon for the rehearing shall be distinctly specified and the name and residence of the counsel of the opposing party if known, and if not known then the name and residence of the opposing party as shown in the record; *provided* that, should the court adjourn within less time than fifteen days after the rendition of the judgment, it may make such rules and regulations in reference to the filing of the motion as to it may seem best for the promotion of the interest of all the parties concerned."

The motion for rehearing not being filed within fifteen days, as is required by the statute, we are not author-

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ized to consider and act upon the same. We are not to be understood, however, as holding that this court will not, under any circumstances, entertain a motion for rehearing after the expiration of the fifteen days. The powers of this court are not so restricted as to prevent the court from correcting clerical errors, mistakes, or defects of form, or making additions of matters which may be necessary to carry out the judgment of the court. Nor does the statute place such a restraint upon the powers of this court as to prevent the court from declaring null and void a judgment rendered in a case not legally before the court. See a full discussion of this subject in *Burr v. Lewis*, 6 Texas, 76. The appellant's case was legally before this court. The jurisdiction of this court having attached (without fraud) regularly and legally, the statute must prevail.

But, as the record presents a question which may occasionally arise in practice, we deem it proper to give our views upon it. The following supposed cases will present the point: Suppose that there are a number of indictments pending in the court and charging the defendant with the same offense; has he the right to force the State to elect upon which it will try? Again: suppose the defendant has been tried upon one, convicted, and a new trial granted, and he is then sought to be placed on trial upon another, charging him with the same offense, can he interpose a legal objection to this proceeding? The answer to these questions, unquestionably, must be in the negative. If convicted or acquitted, or if jeopardy has attached, this could be pleaded to the prosecution, whether the indictment was then pending or was subsequently presented. The fact that another indictment was then pending in the same or some other court, for the same offense, can never be interposed to a prosecution. (We are not discussing the question of bail.)

If the minutes of the court fail to show that the indict-

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ment was presented, this should have been objected to before verdict; it cannot be made a ground for a motion in arrest.

The motion for rehearing not being made in proper time, it is, therefore, dismissed.

Motion dismissed.

ELBERT GASTON v. THE STATE.

1. **TRANSFER OF MISDEMEANOR CASES FROM THE DISTRICT TO INFERIOR COURTS.**—Certificate of the district clerk which sets out that "the foregoing is a true copy of all the proceedings taken in the above case in the District Court, together with a true statement of the bill of costs accrued therein in the District Court, and that the indictment and all papers relating to the same on file in said court, are herewith transmitted," is a substantial compliance with art. 437, Code Crim. Proc.
2. **PRACTICE — CONTINUANCE — BILL OF EXCEPTIONS.**—The action of the trial-court in refusing a continuance will not be revised unless challenged there and presented to this court by an authenticated bill of exceptions. Recital in the judgment that a continuance was refused, and that the defendant excepted, will not supply the place of a specific bill of exceptions.
3. **DILIGENCE.**—Acceptance of service of a subpoena on the morning of the trial by a witness who resided eleven miles distant from the court-house, is not such diligence as, in the event of the non-attendance of the witness, will authorize a continuance. See the opinion with respect to the service of subpoena by acceptance.
4. **AGGRAVATED ASSAULT** and aggravated assault and battery being synonymous as used in our statute, the technical inaccuracy of their use as convertible terms is not an objection to the charge of the court.
5. **SAME.**—Want of specific proof that the defendant was an adult male is not an available objection, when the record shows that the question was not in controversy below, and is not suggested by the facts in evidence.
6. **CHARGE OF THE COURT.**—The defense asked a charge for acquittal, if the jury believed from the evidence that when the defendant struck the prosecuting witness with a plow-line she was in the act

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of turning defendant's mule from a water-trough, though admonished not to do so, whereupon he struck her with the plow-line: *Held*, properly refused as being a charge upon the weight of evidence, and as obnoxious to art. 491, Penal Code, which justifies the use of a necessary degree of force to effect the lawful purposes specified.

APPEAL from the County Court of Rusk. Tried below before the Hon. A. J. SMITH, County Judge.

The indictment charged the appellant, an adult male, with an aggravated assault upon Sudie Jordan, a female. The trial resulted in the conviction of the appellant, with his punishment assessed at a fine of twenty-five dollars.

The substance of the testimony for the State was, that the prosecuting witness and her husband were "croppers" on the farm of Mrs. M. A. Gaston. That at noon on the day on which the offense was committed, the defendant and the witness's husband came up to witness's house from plowing, leading their mules. The witness's husband tied his mule to the fence, telling witness that he was going to procure provender for the animals, and directing her to request the defendant to lead his, witness's husband's, mule to the water-trough, and water it. She requested defendant, as directed by her husband, but he refused, and proceeded to the water-trough with his own mule. The witness followed and told her husband that she would not draw water for defendant's mule, as he had refused to comply with the request to lead the other mule to the trough. She took the defendant's mule by the bridle and turned it around at the trough where it was drinking, in order to make room for her husband's mule to drink. Defendant ordered her to release the mule, which she did not do. He repeated his command to release the mule, emphasized it with an oath, and struck her in the face with the end of the plow-line, raising a "wherk" on her cheek, as large as a finger.

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This witness was corroborated by the testimony of Harry Jordan.

The defense offered no testimony.

Drury Field, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The certificate of the district clerk transferring the case from that court to the County Court is in substantial compliance with the provisions of the statute, and hence the court did not err in overruling defendant's objections *in limine* based upon supposed defects in the same. Code Crim. Proc. art. 437; *Coker v. State*, 7 Texas Ct. App. 84.

Without a bill of exceptions reserved to the overruling of an application for continuance the ruling will not be revised. A recital in the judgment that the application was overruled and defendant excepted will not answer in lieu of a specific bill of exceptions. *Nelson v. State*, 1 Texas Ct. App. 41, and authorities cited. In the Rules for the government of proceedings in the District Court it is expressly provided that "the rulings of the court upon applications for continuance and for change of venue, and other incidental motions, and upon admission or rejection of evidence, and upon other proceedings in the case not embraced in Rules 53 and 55, when sought to be complained of as erroneous, must be presented in a bill of exceptions signed by the judge and filed by the clerk, or otherwise made according to the statute, and they will thereby become a part of the record of the cause, and not otherwise. Rule 55a.

In the case before us the judge did not sign or approve the bill. But, had the bill of exceptions been properly signed and approved the application, we think, would still be wanting in diligence. It is stated that the witness on account of whose absence it was sought resided

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eleven miles from the county seat, and that she had accepted service of the subpoena issued for her on the very morning of the trial. It is not shown whether at the time of the acceptance of service the process was in the hands of the proper officer, or not. Such fact might be necessary to establish a proper service by acceptance, in order to hold the witness liable for contempt in case of disobedience, if, indeed, a witness can render himself liable for punishment when the service is by acceptance.

Be that as it may, the service of the subpoena on the day of the trial, eleven miles from the court-house, and the witness too in bad health, does not show proper diligence; and would not, according to Mr. Greenleaf, even had the witness been in good health. He says "the service of a subpoena upon a witness ought always to be made *in a reasonable* time before trial, to enable him to put his affairs in such order that his attendance upon the court may be as little detrimental to his interest as possible. On this principle a summons in the morning to attend in the afternoon of the same day has been held insufficient, though the witness lived in the same town and very near to the place of trial." 1 Greenlf. Ev. sec. 314. Whilst we are not prepared to indorse the position stated in the last sentence,—for that might be carrying the rule too far,—still we think that proper diligence would require the service and notice of more than part of a day where the residence of the witness is remote.

The technical accuracy of the charge in its use of the terms "aggravated assault" and "aggravated assault *and battery*," as though they were interchangeable and convertible terms, is also complained of. This case was discussed in the case of *Kennedy v. State*, decided at the present term, and they were held synonymous as used in our statute. *Ante*, p. 73.

Another objection urged is that the fact that defendant was an adult male was not explicitly proved. An exam-

Statement of the case.

ination of the statement of facts will show that no question or controversy whatsoever was raised with regard to the matter, and where there is no question of the kind availed of in the court below nor suggested by the facts in evidence, the case will not be reversed for want of specific proof of the fact. *Tracy v. State*, 44 Texas, 9; *Veal v. State*, 8 Texas Ct. App. 476.

A special instruction requested in behalf of defendant was properly refused by the court. This instruction was with reference to the degree of force permissible in repelling violence offered to the property of another. Besides being obnoxious to the imputation that the instruction was upon the weight of evidence, it was also repugnant to the statute which provides that "where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose." Penal Code, art. 491.

We see no error in the record, and the judgment is affirmed.

Affirmed.

MARY SMALLEY v. THE STATE.

DISORDERLY HOUSE.—EVIDENCE of a single witness that he had had sexual intercourse with the daughters of the defendant several times, but never at her house, is insufficient to sustain a conviction for keeping a disorderly house for the purpose of public prostitution.

APPEAL from the County Court of Harrison. Tried below before the Hon. W. T. S. KELLER, County Judge.

The opinion discloses the case. The fine assessed was in the sum of \$100.

L. P. Wilson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Syllabus.

WHITE, P. J. Appellant was indicted and prosecuted to conviction under art. 339, Penal Code, for keeping a disorderly house for purposes of public prostitution.

Sam Johnson was the only witness whose testimony tended to support the charge, and he says: "I know the girls Maria and Nina [daughters of defendant] are called whores. I got my works in with the girls several times, but this was not at the house where defendant lived." There is not a single witness who testifies to any act of illicit intercourse at the house which defendant kept; and the witness Sam Johnson was impeached for veracity by the city marshal and four other witnesses.

We cannot get our consent to permit this conviction to stand upon such meager evidence. The cases of *Sylvester v. State*, 42 Texas, 496, *Couch v. State*, 24 Texas, 557, and *Brown v. State*, 2 Texas Ct. App. 189, each had evidence to support the verdict and judgment, and which was held sufficient. In this case it is not, and the judgment is therefore reversed and the cause remanded.

Reversed and remanded.

SILAS KNOX v. THE STATE.

1. THEFT — EVIDENCE.— The State having proved the possession by the defendant of property recently stolen, he was clearly entitled to put in evidence his explanations of his possession made at the time.
2. PRACTICE — BILL OF EXCEPTIONS.— The court below erred in refusing to allow the defendant time to prepare his bill of exceptions.
3. EVIDENCE.— See the opinion for evidence in a theft case held of first importance to the defense, and which should have been admitted.
4. CHARGE OF THE COURT that fails to meet every phase of the case as made by the evidence is error.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

Statement of the case.

The indictment was for the theft of a mare, the verdict guilty, and the punishment assessed was five years in the penitentiary.

T. C. Ellis testified that he had the defendant working for him in his crop at \$13 per month. Mr. J. W. White employed the witness to make a tank for him, agreeing to pay him therefor \$50, the mare in question to be given in lieu of \$25, and the balance in money. The witness employed the defendant to assist him in the construction of the tank, agreeing to give him the mare at the valuation of \$23. The witness and the defendant went to White's together and got the mare. The defendant worked on the tank three or four weeks, riding the mare to and from the tank, and staking her out when at work during the day. The witness had trouble with the defendant on the evening before the mare was taken, and ordered him off of the premises, and would have whipped him had he not left when ordered. The witness owed the defendant at this time \$10.40, and told him to come to the house next morning for an order on White or the store for the money in settlement. The defendant expressed himself as satisfied with this mode of settlement, and said he had "no interest in the d—d mare." This all occurred after supper, in the presence of witness's family and Mr. Dilworth. The defendant took the mare in the night-time from where the witness had staked her. The witness recovered her, running on the range west of the Guadalupe river. There was a gun at the tank at the time of the difficulty between the witness and the defendant, but it was not in shooting order. The agreement was that the defendant was not to have the mare until he had finished paying the witness for her. After the arrest of the defendant, and while he was under bond, the witness asked him why he had taken the mare, and he replied "because you agreed to let me have her for work, and I have partly paid for her in work."

Statement of the case.

W. P. Dilworth testified that he was at Ellis's house the night that the mare was taken, and heard the witness Ellis and defendant when they were making their settlement. Ellis told defendant to return next morning and he would give him an order on White or the store for the balance of the money due him. He heard the defendant say that he had no interest in the mare. He heard Ellis tell defendant to go somewhere else and work enough to finish paying for the mare, and then to come and get her. Ellis ordered the defendant to leave the premises, and threatened to whip him if he did not. The two, Ellis and defendant, were quarreling.

J. W. White testified that in June, 1879, he proposed to Ellis to pay him \$25 in money and the mare at \$25 if he, Ellis, would dig a tank for him. Ellis replied that before he would contract for the work, he would see if he could get the defendant to assist for the mare. In a short time thereafter Ellis and the defendant began work on the tank, and in a few days they came to the house of witness to get the mare. The witness delivered the animal to Ellis with the understanding that the property should not pass until the tank was completed. The defendant rode the mare off. The defendant worked on the tank three or four weeks, but left several days before it was completed.

Willis Arrington testified that the defendant came to his house in July, 1879, riding the mare. He staid there three or four weeks. He traded the mare to the witness, and during the time mentioned the mare ran in the witness's pasture. The mare broke out of the pasture finally, and the witness helped the defendant hunt for her, three days. The witness had known the defendant five or six years, and previous to this prosecution had never known him to be charged with a violation of law.

Neal, Ran, and Gran Satterwhite all testified that, after the sale of the mare by White, the defendant rode her

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everywhere he went, and claimed her publicly as his property, purchased by him from Ellis.

T. H. Spooner, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was convicted of theft of a horse.

To prove the guilt of the defendant, the learned judge below, in his explanation of a certain bill of exceptions, informs us that "The *State* proved by the witness Arrington that he purchased the horse from defendant. Defendant proposed to prove what he (defendant) said to Arrington at the time, which was objected to, and defendant's counsel persisted and desired to state in the hearing of the jury what he expected to prove by said witness, and I *did not* think the evidence *could* be legitimate for any purpose, and did not think it proper for the counsel to state what he desired to do, in the presence of the jury, and therefore signed his bills, believing that defendant cannot make evidence for himself, no matter what he could prove by the witness."

The fact that defendant was in possession of and sold the horse to witness Arrington clearly shows a recent possession, and unless explained becomes very strong inculpatory evidence against him. His explanations, therefore, of the manner in which he obtained possession of the horse were not only clearly admissible, but a failure to explain frequently becomes an inculpatory fact itself. The State having introduced the possession by the defendant, not only were his explanations admissible but of imperative necessity.

We are of opinion that no rule is better settled and more thoroughly supported by the authorities than the one holding these explanations admissible. The bill of exceptions shows that the counsel for the defendant asked time to prepare his bill at the time. This he had the legal

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right to do. Code Crim. Proc. art. 686; Rev. Stats. art. 1358; *Sager v. State*, ante, p. 110.

Judging from the other bills on the same subject, we are justified in presuming (and as the judge below denied the defendant's counsel the right to reserve his bill at the time, presumption is the last resort) that the explanations would have been reasonable and complete. The evidence on the part of the State was to the effect that "Ellis had agreed to make a tank for one Mr. White, for which he was to receive fifty dollars,—twenty-five dollars of which was to be paid in the mare." Ellis employed the defendant to assist him, and, after working on the tank for some while, White, who then owned the mare, delivered the same to the defendant in the presence of Ellis. Defendant used and rode the mare as his own property. Defendant worked on the tank for three or four weeks, and finally defendant and Ellis had a difficulty, Ellis driving defendant from his place, using a gun,—the gun not being in shooting order. The defendant disclaimed any right to the mare at the time of the difficulty. And the recent possession of the defendant was shown by the evidence of the witness Arrington. This being the case as made by the State, the explanations of defendant's possession to the witness Arrington were of the first importance,—not only competent evidence but demanded of him by the very nature of the case.

The court, therefore, erred in rejecting these explanations. The theory of the defense, which was strongly supported by the facts, is that of a claim to the property. This defense was utterly ignored by the charge of the court; which was an error.

The judgment is not supported by the evidence which if necessary could be very clearly shown. For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Syllabus.

CAL. COHEA v. THE STATE.

11	153
87	63

1. CONSPIRACY -- EVIDENCE -- PRACTICE. — Conspiracy to commit an offense cannot be proved by the confessions of a co-conspirator made to witnesses after the consummation of the offense, and in the absence of the defendant.
2. SAME — CASE STATED. — C. testified that B. confessed to him, in the absence of defendant, that he and defendant had conspired to commit the offense, and V. testified that C. repeated to him B.'s confession; after which B. was introduced by the State and testified to the conspiracy, and to the commission of the offense in pursuance thereof. *Held*, that the evidence of C. was hearsay, and that of V. doubly so, and inadmissible because (1) conspiracy cannot be shown by the acts, declarations or confessions of a co-conspirator, but must be proved *aliunde*; and (2) because neither the acts, declarations nor confessions of a co-conspirator, done or made after the completion of the offense, are admissible. But to authorize revision by this court it must appear that objection to such proof was made when it was offered.
3. SAME — CORROBORATION. — While conspiracy cannot be established by the confessions of a co-conspirator to third parties after the offense, and in the absence of defendant, yet, if the co-conspirator is placed upon the stand, it is competent for him to testify not only to the conspiracy but to all matters material to the issue; but in such case corroboration is essential to sustain a conviction. If, however, the conspiracy has been legally established, the acts, declarations, etc., of a co-conspirator, before the completion of the offense, are admissible, and the rule which requires corroboration does not apply.
4. PRACTICE. — During the argument of defendant's counsel, the State was allowed to recall a witness who had been released from the rule and had heard the comments of counsel on the evidence, and the bill of exceptions states that the "defendant objected." *Held*, too vague and indefinite for review; that the ground of objection should be stated; and further, that the court was authorized to receive evidence at any stage of the proceedings pending the argument, when necessary to a due administration of justice, and its action in this respect will not be revised except where prejudice to the defendant is manifest.
5. VERDICT. — The indictment charging theft of property over the value of twenty dollars, a verdict that finds the defendant "guilty of the offense as charged in the indictment" is a sufficient finding that he is guilty of theft of property of the value of twenty dollars or over.

Statement of the case.

APPEAL from the District Court of Gonzales. Tried below before the Hon. E. LEWIS.

The indictment charged the theft in Gonzales county, Texas, on the 23d day of April, 1881, of a gun, a quantity of flour and bacon, of the aggregate value of thirty-six dollars, the property of G. W. Carroway. The verdict assessed a punishment of five years in the penitentiary.

About the substance of the testimony for the State was, that on his return from a neighboring town on April 24th, the prosecuting witness discovered that his premises had been entered and the property named carried away. He secured process for the arrest of the defendant and his brother Tom, and a subpoena for one Burton, and with an officer and other parties proceeded to their place of business and arrested them. When the officer returned to the party, having the defendant in charge, he told the prosecuting witness that Burton, upon whom he served the subpoena, confessed that he and defendant stole the articles. The officer's testimony and that of the prosecuting witness was identical. Burton, on being introduced, testified to the conspiracy between himself, Tom Cohea and defendant to rob the house in the absence of the prosecuting witness, and to the perpetration of the robbery by himself and the defendant, giving a detailed account of the manner and incidents of its consummation. He testified also that he disclosed the places where the articles were secreted; and some of which were found.

The defense appears to have rested its case on the sufficiency of the evidence.

Fly & Davidson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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HURT, J. The State proved the confessions of one Burton, in which he gave a full account of the conspiracy between himself, Tom Cohea and the defendant, to steal the goods charged to have been taken in the indictment, and not only the conspiracy, but its consummation resulting in the theft and concealing of the property. This confession was proved by two witnesses; to which there was no objection made by the defendant. The State then introduced Burton, by whom the conspiracy and the theft,—in fact everything from the inception to the final disposition of the property,—was shown. To this the defendant objected upon the ground that a conspiracy cannot be proven by a co-conspirator, but must be shown by evidence *aliunde*.

The evidence failing to show that defendant was present (but clearly showing to the contrary) when the confession was made, the evidence of Carroway and Vasberg was not admissible. That of Vasberg was hearsay, and that of Carroway doubly so,—Vasberg repeating to Carroway what Burton had confessed to him. If the defendant had objected to this proof when proposed to be made by Carroway or Vasberg, the court should have sustained the objection upon the grounds, 1st, the conspiracy cannot be shown by the acts, declarations or confessions of a co-conspirator,—this must be done *aliunde*; 2d, after the completion of the crime, neither the acts, doings, declarations nor confessions of a co-conspirator are admissible. In this case there was no act save the confession of Burton sought to be introduced, which was of course after the theft was complete; hence the evidence of Carroway and Vasberg was not competent to prove the conspiracy, nor any other fact *obtained from Burton*. The authorities cited by appellant are in point, and sustain the above propositions, and if the defendant had objected to the evidence of Carroway and Vasberg, and reserved bills of exceptions, we would have been compelled to reverse the

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judgment. This was not done, and hence the objection cannot be urged here.

It is contended, however, that the conspiracy cannot be proved by Burton. This, we think, is not the case; for if Burton is placed upon the stand, the State can not only prove the conspiracy, but any other fact which is relevant. Let us illustrate. C. is on trial. The State proposes to prove by V. (not B.) a conspiracy between C. and B., this proof to be made by V. testifying to the confessions of B. C. not being present when the confession of B. was made, the confession of B. thus sought to be introduced is not competent for any purpose. But C. being on trial, the State offers to prove by B. a conspiracy between C. and B., the witness. In this case the State can not only prove the conspiracy, but any other fact material to the issue. When a conspiracy is legally shown, the acts, doings and declarations of a co-conspirator are admissible if occurring before the completion of the offense; nor does the rule which requires corroboration apply. But when a co-conspirator is made a witness, a conviction cannot be had upon his testimony unless corroborated in the manner pointed out by the Code. In the one case there is no taint, no cloud, and no corroboration is necessary; in the other, the complicity of the witness places him under such a cloud as requires corroboration before a conviction can legally be had.

Again, if a co-conspirator is made a witness there is no necessity of proving a conspiracy in order to the admissibility of the evidence of the co-conspirator. He can swear to the act directly; and if this can be done, certainly he can give evidence of any other inculpatory fact. In most of the cases in which a conviction is sought upon the evidence of an accomplice, it is the part of wisdom to prove by the accomplice as many inculpatory facts as possible; for if he be corroborated by another witness upon any fact sworn to by him which tends to

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connect the defendant with the offense, it would occupy a much more favorable position before the jury. We are not to be understood that to corroborate an accomplice, a material fact *sworn to by the accomplice* must be corroborated; for it is now well settled that facts sworn to by another witness — whether testified to by the accomplice or not — which tend to connect the defendant with the offense, if of sufficient cogency, will suffice.

The witnesses were placed under the rule; the evidence was closed, the State had opened the argument, and counsel for defendant was addressing the jury. At this stage of the proceedings the State stopped counsel for defendant and recalled the witness J. J. Carroway, who had been under the rule, and, having been released, had heard the argument of the attorneys; by whom the State proved, over the objections of the defendant, “that, when defendant was arrested and carried to the house at which he lived, he placed a certain saddle on the horse ridden by him to the justice’s office, and that upon this saddle was found the mark of a rope, and grease, which to the witness looked like bacon grease.” The grounds of objection are not stated in the bill; it simply states that “defendant objected.” This is too vague; the ground or reason for the objection should have been stated. And if defendant had objected because the defendant was under arrest, and the proper predicate had not been shown, a very serious question would have been presented. This, however, was not done. We fail to see in what manner the defendant was injured by the manner of the introduction of this evidence. Art. 661, Code Crim. Proc., makes it the duty of the court to allow testimony at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice. The evidence was material, tending to corroborate the accomplice Burton; the due administration of justice required its reception clearly in this case, no injury being

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shown to defendant. That the witness heard the comments of the attorneys upon the evidence does not show or tend to show how the defendant's case was prejudiced or injured. In this case we fail to perceive an injury. There may be serious damage inflicted upon the rights of defendant by such a procedure; but to authorize this court to reverse, it must be clearly shown.

The objections to the charge of the court, we think, are not well taken.

The verdict of the jury is objected to, because it does not find the defendant guilty of theft of property of the value of twenty dollars or over. The indictment charges the theft of property over the value of twenty dollars; the proof sustains this charge. The jury found the defendant "guilty of the offense charged in the indictment, and assessed his punishment at five years' confinement in the State penitentiary at Huntsville, at hard labor." Theft includes different degrees. Art. 714, Code Crim. Proc. This being the case, what is the rule? "When a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree, *naming it*, but guilty of any degree inferior to that charged in the indictment or information." Art. 713, Code Crim. Proc. In this case the jury find the defendant guilty of the highest degree charged in the indictment; it was not, therefore, necessary for the verdict to name the offense or degree. This is only necessary when a less degree is found than that charged. We are not passing on a case in which the different degrees are submitted to the jury in the charge. In murder, however, we have a special provision, which will be found in art. 607 of the Penal Code. It is as follows: "If the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find

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of what degree of murder he is guilty; and in either case, they shall also find the punishment. The cases referred to by appellant in his brief are murder cases, or assault to murder, except two, and these two are not in point. We are of the opinion that the verdict of the jury is not obnoxious to the objection made by the defendant, but is legal and sufficient.

The evidence supports the judgment, which must be affirmed.

Affirmed.

11	159
30	449
30	576
31	561

EX PARTE JOHN BOLAND.

11	159
36	253
38	587

1. MUNICIPAL PROSECUTIONS.—Though all prosecutions for offenses against the laws of the State must be carried on in the name of "The State of Texas," yet a city or town incorporated under the general law may ordain that offenders against its penal ordinances shall be prosecuted in the name of the municipality. See the opinion *in extenso* on this subject, and note the construction placed on the enactments involved in the question.
2. HABEAS CORPUS.—In this State it is well settled that a prisoner held in custody under judicial proceedings which, though voidable, are not void, cannot obtain relief by *habeas corpus*.
3. SAME.—The writ of *habeas corpus* does not operate as a writ of error, a *certiorari*, or an appeal. If, as in the present case, the relator is in custody under a *capias pro fine*, the judgment imposing the fine can be revised on *habeas corpus* no further than to determine whether the court *a quo* had jurisdiction to render it. Mere error in the judgment is not remediable by *habeas corpus*, even when, as in the present case, no appeal will lie to the judgment. *Quære*: what presumptions obtain in this State in favor of proceedings had in courts of justices of the peace, mayors and recorders?
4. CARRYING WEAPONS AS A MUNICIPAL OFFENSE.—A city ordinance made it penal to carry prohibited weapons within the corporate limits, but omitted to exempt travelers as does the Penal Code of the State. *Held*, that the ordinance is not therefore void, but should be construed in subordination to the provisions of the Code, which except travelers and certain other classes from the inhibition.

Argument for the appellant.

HABEAS CORPUS on appeal from the County Court of Grayson. Tried below before the Hon. S. D. STEEDMAN, County Judge.

The case is clearly disclosed in the opinion of this court.

J. P. Cox, for the appellant. The court had jurisdiction to try the *habeas corpus*, although the same court rendering judgment. Art. 74, Code Crim. Procedure; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; Same Case, 19 Amer. Rep. 211.

The ordinance is void because it contravenes the law of the State on the same subject, and fails to except travelers from its provisions. Penal Code, art. 319; *Hamilton v. State*, 3 Texas Ct. App. 643; *Canton v. Nist*, 9 Ohio St. 439; *Cooley on Limitations*, 344, and note; *Dillon on Municipal Corp.* (2d ed.) 263; 11 Ohio St. 688; *Kennebec R. R. Co. v. Kendall*, 31 Maine, 470; *U. S. v. Hart*, 1 Pet. C. C. 390; *Butchers' Ben. Ass'n*, 35 Pa. St. 151; *Mayor v. Beasley*, 1 Humph. (Tenn.) 232.

A prosecution under a city ordinance is a criminal action, even though the same act is made criminal by statute. Penal Code, art. 26; State Const. art. 2, sec. 10; *Burns v. La Grange*, 17 Texas, 415; *Smith v. San Antonio*, 17 Texas, 643; *Slaughter v. People*, 2 Doug. (Mich.), 334.

The latter proposition being true it follows that all prosecutions, even though before a recorder, must be carried on in the name of "The State of Texas." Constitution of State of Texas, art. 5, sec. 12; Code Crim. Proc. art. 19. In *Durst v. State*, 7 Texas, 74, and *Cox v. State*, 8 Texas Ct. App. 305, it was held that the last clause in the same article 5, to wit, "against the peace and dignity of the State," was indispensable. We direct this court's special attention to the reasoning of the court in construing an analogous clause to the one now before this court in the Constitution of Nebraska, wherein it is held that a

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city cannot prosecute in its corporate name. *Cook v. Brownville*, 4 Nebraska, 101; Bishop's Stat. Crimes, sec. 406; *State v. Soragan*, 40 Vermont, 450.

Mayors' and recorders' courts are governed by same rules and mode of procedure as justices of the peace. Rev. Stat. art. 361; Code Crim. Proc. art. 895; *Prince v. State*, 37 Texas, 476. This being true, it follows that they can only enter the same judgment as a justice. Code Crim. Proc. art. 942.

Courts created by statute can only exercise such power as is given them thereby, and are dependent upon the statute for power. *Baker v. Chisholm*, 3 Texas, 157; *Cowan v. Nixon*, 28 Texas, 231; *Roach v. Van Riswick*, 8 Reporter, 814.

The demurrer of the city of Denison to relator's petition for *habeas corpus* admits to be true all stated therein. 1 Bishop Crim. Proc. sec. 741.

We therefore respectfully submit that the judgment of the County Court is a void judgment because it had no power or jurisdiction to render the judgment, and, having refused to discharge the relator, we ask that the case be reversed and the relator discharged.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was arrested on a complaint charging him with the violation of one of the ordinances of the city of Denison, and was fined in the sum of twenty-five dollars. From the action of the recorder an appeal was taken to the County Court, where a like judgment was rendered, and he was condemned to pay to the city of Denison twenty-five dollars and costs. The appellant failing to pay the amount of fine and costs, a *capias pro fine* was issued, directing that he be arrested and held until the fine and costs were paid.

Whilst so in arrest and in the custody of the sheriff,

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under and by virtue of the proceedings above set out, he sued out a writ of *habeas corpus* before the county judge, and, the petitioner being brought before the county judge in response to the writ, the city attorney of the city of Denison moved to dismiss the writ of *habeas corpus*, and to remand the applicant to the sheriff of the county for the following reasons: "1. Because all the matters and things complained of by said Boland are *res adjudicata*; 2, because the court has no jurisdiction to revise and correct and set aside its judgments by proceedings in the nature of a writ of *habeas corpus*; 3, because, if the defendant Boland has any remedy for the wrongs complained of in his petition, then the same is by an appeal to the Court of Appeals, and not by a writ of *habeas corpus* in this court; 4, because said petition shows on its face that the said Boland is held in custody by process issued from a judgment rendered by a court having proper jurisdiction, in full force and effect and not in any manner appealed from; and 5, because of other defects in the said petition, which shows that the said Boland had no legal cause of complaint." This motion coming on to be heard, it was sustained and the writ of *habeas corpus* was dismissed, and the relator was remanded to the sheriff until the judgment of the County Court in the case of the city of Denison against the relator should be satisfied; and from that judgment this appeal is prosecuted.

It is averred in the relator's petition that the complaint and all the proceedings, the process, and the trial before the recorder were had and carried on in the name of the city of Denison, and not in the name of the State of Texas, as required by the Constitution and laws of the State, and notwithstanding the protest and objection of the petitioner to the jurisdiction of the recorder, and to said manner of procedure in the form of criminal proceeding. It seems, too, that a similar "objection and protest" was made in the County Court on the hearing of

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the case on appeal from the recorder's court. It is charged in the petition for *habeas corpus* "that neither the said recorder's court nor said County Court had any power, jurisdiction, or authority to arrest, detain or fine your petitioner in a criminal proceeding prosecuted in the name of the city of Denison; that the pretended ordinance under which your petitioner was prosecuted and charged with violating was and is unconstitutional, illegal and void, because it contravenes the statute of the State of Texas on the same subject. . . . That all of said judgment, proceedings and arrest are radical in character, illegal and void." It is stated in the petition that both the recorder and the County Court entertained the proceedings against the relator notwithstanding his protests and objections. It is not averred that he made these protests and objections before either tribunal in open court and whilst the case was on trial before the court; so that, applying the rule that the language of the pleading must be construed most strongly against the pleader, it is but fair to presume that these protests and objections were made to some one else than the judges, and somewhere else than in either the recorder's court or the County Court.

There are three questions presented for consideration and determination: 1st. Is it lawful for the city of Denison to prosecute those who violate the penal ordinances of the city, in the name of the city, or must such violators be prosecuted in the name of the State of Texas? 2d. Is the proceeding under which the relator is shown to be held void, or simply voidable? If void, *habeas corpus* will relieve; if voidable merely, it will not. 3d. Is the ordinance of the city unconstitutional or illegal?

The general incorporation law of this State, under which the city of Denison seems to be organized, among other things provides that the cities or towns may establish the office of recorder, and prescribes the jurisdiction of recorders' courts, and also enacts "that all prosecu-

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tions, trials and proceedings had in said courts, under this title, shall be governed by the laws and rules regulating trials, prosecutions and proceedings in justices' courts in force at the time." Rev. Stats. art. 361. And for any offense for which the penalty may be fine or imprisonment, or both, the defendant, if he demands it, "shall be entitled to be tried by a jury of six men, to be summoned, impaneled and qualified as jurors in justices' courts under the laws of this State." Art. 362.

It is found provided in the title (Title XI, Code Crim. Proc.) relating to proceedings in criminal actions before justices of the peace, mayors and recorders (page 106), that "The mayor, or the officer by law exercising the duties usually incumbent upon the mayors of incorporated towns and cities, and recorders thereof, shall exercise, within the corporate limits of their respective towns or cities, the same criminal jurisdiction which belongs to justices of the peace within their jurisdiction, under the provisions of this Code." (Art. 894.) And "The proceedings before mayors or recorders shall be governed by the same rules which are prescribed for justices of the peace, and every provision of this Code with respect to a justice shall be construed to extend to mayors and recorders within the limits of their jurisdiction." Art. 895.

In article 903 the requisites of a complaint, such as is prescribed in the preceding article (902), are enumerated, as follows: "The complaint shall state, 1. The name of the accused, if known; and if unknown, it shall describe him as accurately as practicable. 2. The offense with which he is charged shall be stated in plain and intelligible words. 3. It must appear that the offense was committed in the county in which the complaint is made. 4. It must show, from the date of the offense stated therein, that the offense is not barred by limitation." Article 905 relates to the warrant to be issued on complaint being made, and declares that "said warrant shall be deemed

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sufficient if it contain the following requisites: 1. It shall issue in the name of the State of Texas. 2. It shall be directed to the proper sheriff, constable, or marshal, or to some other person named therein. 3. It shall command that the body of the accused be taken and brought before the authority issuing the warrant at a time and place therein named. 4. It must state the name of the person whose arrest is ordered, if it be known; and if not known, he must be described as in the complaint. 5. It must state that the person is accused of some offense against the laws of the State, naming the offense. 6. It must be signed by the justice, and his office named in the body of the warrant, or in connection with his signature." There is another provision of the Code which should be taken into consideration as bearing upon our present inquiry, as follows: "A defendant shall not be discharged by reason of any informality in the complaint or warrant, and the proceeding before the justice shall be conducted without reference to technical rules." Art. 916 of the same title referred to above.

From the provisions of the several articles of the Code which we have quoted, and from the whole scope and tenor of four chapters embraced in Title XI of the Code of Criminal Procedure, we are led to the conclusion that these provisions relate exclusively to the prosecution of criminal offenses against the laws of the State, whether prosecuted before justices of the peace, mayors or recorders, and afford no light upon the precise question we are now considering, to wit: Is it lawful for the city of Denison to prosecute those who violate the penal ordinances of the city, in the name of the city, or must such violators be prosecuted in the name of the State of Texas? Inasmuch, therefore, as the general laws seem not to furnish any precise rule by which to decide this question, we must look to the regulations prescribed by the city, and the authorities conferred by the general law under

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which the city corporation derives its authority, for a solution of the question. Now, in the absence of anything appearing to the contrary, it is fair and legal for this court to presume that the city of Denison had by ordinance provided for the proceedings had in the present case, and that the recorder proceeded in conformity to the rules and regulations which had been prescribed for his government in prosecutions for violations of the ordinances provided by the proper law-making power of the city; that what was done had been done in accordance with and not in violation of law or without authority of law. And therefore we are of opinion that the interrogatory propounded must be answered in the affirmative, that those amenable to the regulations and ordinances of the city of Denison may be prosecuted for a violation of the penal ordinances in the name of the city of Denison, and that it is only necessary that the prosecutions should be conducted in the name of the State when the prosecution shall be for a violation of the laws of the State.

2. Is the proceeding under which the relator is shown to be held void, or simply voidable? The doctrine is well settled, in this State at least, that if the proceeding under which a person is held in custody and restrained of his liberty is merely voidable, he cannot be released on *habeas corpus*, but must seek his remedy in some other manner. The ordinary mode of seeking redress against a voidable judgment in a criminal proceeding would be by appeal. The writ of *habeas corpus* was never designed to operate as a writ of error, a *certiorari*, or as an appeal. *Perry v. State*, 41 Texas, 488; *Darrah v. Westerlage*, 44 Texas, 388; *Ex Parte Schwartz*, 2 Texas Ct. App. 75; *Ex Parte Slaren*, 3 Texas Ct. App. 662; *Ex Parte Oliver*, 3 Texas Ct. App. 345; *Ex Parte Mabry*, 5 Texas Ct. App. 93; *Griffin v. State*, 5 Texas Ct. App. 475; *Ex Parte McGill*, 6 Texas Ct. App. 498. The writ may be resorted to when the proceedings sought to be inquired into are radical in

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their character, illegal and void. *Ex Parte Slaren*, 3 Texas Ct. App. 662. It deals with such irregularities as render the proceedings void. *Perry v. State*, 41 Texas, 488. It does not reach such irregularities as would render a judgment voidable only, but only such irregularities as render the proceedings void. *Ex Parte McGill*, 6 Texas Ct. App. 498. Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguishable from mere rules of procedure. *Ex Parte Schwartz*, 2 Texas Ct. App. 75. An irregularity is defined to be a want of adherence to some prescribed rule or mode of proceeding. It consists in omitting to do something which should have been done, or in doing it in an unreasonable time or in an improper manner. *Id.* When the return to the writ of *habeas corpus* shows a commitment to enforce the payment of a fine imposed by a court, the extent to which the judgment imposing the fine can be investigated is to inquire into the jurisdiction of the court to impose the fine. *Darrah v. Westerlage*, 44 Texas, 388.

Under the provisions of the Code, the Court of Appeals cannot revise the opinion of the trial court on incidental questions arising on the hearing; the case must be determined on the law and the facts arising upon the record. *Ex Parte Rothschild*, 2 Texas Ct. App. 560. Neither the sufficiency nor validity of an indictment, nor the constitutionality of the law upon which the indictment is founded, are questions which can be appropriately presented by a writ of *habeas corpus*. *Parker v. State*, 5 Texas Ct. App. 579. When the County Court obtains jurisdiction by appeal, its judgment cannot be revised on appeal. *Ex Parte Schwartz*, *supra*; *Ex Parte Call*, 2 Texas Ct. App. 479.

There is a class of cases where the right of appeal ends with the County Court, however great the seeming hardship may be to the party interested. Among these cases

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may be classed criminal proceedings commenced before justices' courts, mayors and recorders of incorporated cities and towns, and taken to the County Court by appeal or otherwise. In such cases the right to appeal further is limited by the Constitution and the laws. If a convicted defendant can bring himself within these constitutional and legal provisions, an appeal will lie to this court; if he cannot, then the judgment of the County Court is a finality, and he is without remedy, even by a resort to the writ of *habeas corpus*. Much discussion is found in the books as to the presumptions to be indulged in favor of the jurisdiction, as between superior and inferior courts. It was said in *Peacocke v. Bell and Kendall*, 1 Saund. 74, cited in Hurd on Habeas Corpus, 368, that a court may be limited and subordinated in its jurisdiction and yet not be an "inferior court in the sense that it ought to certify everything precisely." There appears to have been some difficulty in the application of this rule to particular courts, and some contrariety of opinion in the rulings of different courts, as to whether the court in question was to be treated as one of general jurisdiction, in whose favor the presumptions in favor of jurisdiction are in general much larger than ordinarily indulged towards inferior courts by the general rule as above laid down. See the cases collated in Hurd on Habeas Corpus, 369. Among the cases mentioned is that of *Wright v. Hazen*, 24 Vermont, 143, in which the court is quoted as having used language which meets our approbation, as follows: "We are aware that the decisions in New York, and probably in some other States, have required the justice to know the facts limiting the extent of his jurisdiction, at his peril. But no such rule has ever been applied to courts of general jurisdiction either in Westminster Hall or in this country; and the jurisdiction of justices of the peace has become so important and extensive that we incline to believe sound policy requires us to extend the same rule of

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construction in favor of their jurisdiction which is done in favor of courts of general jurisdiction." The italics are in the work we copy from. To our minds the rule here laid down is founded in reason and would apply with perhaps additional force to courts of justices of the peace in Texas, where their jurisdiction is so important and extensive as they are under our system.

If we are correct in our application of the rule laid down in the Vermont case quoted from,—and we believe our conclusions are correct,—then the presumptions of law in favor of the jurisdiction of justices of the peace in this State would be the same as are accorded in the books to what are denominated courts of general jurisdiction, and the same rules, so far as applicable under the statutory provisions quoted above, would apply to mayors' and recorders' courts. Still, we appreciate the force of the following statement of Mr. Hurd: "As a want of jurisdiction renders a legal process void and entitles the prisoner imprisoned under it to be set free, the existence of it becomes in all cases a question of leading importance. The power of one court to declare the judgment of another a nullity, when that judgment is only brought collaterally in question, is one which requires in its exercise cautious circumspection, even when the question arises before the highest judicial tribunal; and it becomes one of exceeding delicacy when it arises before a co-ordinate, or, as it frequently happens in *habeas corpus*, before an inferior tribunal." Hurd, 369. If we adopt the Vermont rule above laid down, with regard to justices of the peace, the rule laid down in *Peacocke v. Bell and Kendall*, 1 Saunders, 74, would be modified so as to read that nothing shall be intended to be out of the jurisdiction of a superior court or a justice's court, except that which specially appears to be so. Whether other of Mr. Hurd's rules would also require modification, it is not necessary now to inquire.

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From a reasonable application of the rules of law above laid down we conclude, without further amplification, that the process by which the relator was held when the writ of *habeas corpus* was sued out, was not a void process, and that *habeas corpus* would not relieve him against its operation. When the original case was before the County Court on the defendant's appeal, he then had his day in court, and, for aught that appears from the proceedings before us, all the questions presented by his petition for *habeas corpus* could then have been presented and decided by the County Court, and such a decision would have been within the jurisdiction of the County Court. And it appearing that the County Court had jurisdiction of the person of the defendant as well as of the matter in litigation, whatever defense he had it became his duty to submit it to that court and at that time; and if by the Constitution and the law he was not entitled to a further appeal he is without remedy, and the writ of *habeas corpus* cannot be invoked to relieve him from custody, he being confined on account of his failure to pay a pecuniary fine imposed against him on a regular trial before a court of competent jurisdiction.

As to the third question involved, to wit, the constitutionality and legality of the ordinance the defendant is charged to have violated, this, too, could have been presented before the County Court when the original case was pending and tried therein, and, if the constitutionality of a law under which a citizen has been indicted cannot be inquired into on *habeas corpus*, as was decided in Parker's case above referred to, we see no reason why the same rule would not apply as well to an ordinance of the city of Denison. But, aside from this, the powers conferred on cities and towns by the general law are large and very general. Among the authorities thus conferred, they are granted general authority to pass, publish, amend, or repeal all ordinances, rules and police reg-

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ulations not contrary to the Constitution of this State. Rev. Stats. art. 418. It is contended that the ordinance under which this appellant was arrested is illegal and void, in that it omits to contain a portion of the provisions of the general law of the State on the subject of carrying arms illegally. The precise variance between the ordinance in question and the general law is that the ordinance fails to include any provision with reference to travelers or to persons fearing an attack upon their persons, whereas the general law permits such persons to carry arms. The ordinance must be construed with articles 318 and 319 of the Penal Code, in order to see the force of the argument. To our minds the proper construction of this ordinance is not that it is illegal and void, but that, whilst the ordinance would not protect a person traveling or one who has reasonable ground for fearing an unlawful attack upon his person, the provisions of article 317, Penal Code, would protect him anywhere in the State, whether in or out of the city of Denison. The ordinance and the Code are susceptible of being construed together so that both may stand, and the ordinance is not obnoxious to the objection urged against it.

As to the question as to whether the county judge had authority to grant the writ of *habeas corpus*. It seems to be conceded by all parties that he had such authority, and hence it is unnecessary in determining this case that we should consider the question further. The appellant is in no condition to question the authority he has himself invoked. Something is said in the relator's petition as to the power of the County Court to amend its judgment after the expiration of the term. This matter is not so presented as that it can be invoked by the appellant in this proceeding. It can at most but amount to an irregularity not susceptible of inquiry on *habeas corpus*. It is only claimed that the judgment was so amended as

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to authorize the issuance of an execution in addition to the imprisonment of the defendant, and the allegation is not supported by proof nor does it appear that the amendment was not made on proper notice to the defendant.

Upon the whole our conclusions are that the appellant has failed to show that he is illegally restrained of his liberty, and that the county judge did not err in dismissing the case and remanding the prisoner into custody, on motion of the city attorney. The judgment must be affirmed.

Affirmed.

B. DURLEY v. THE STATE.

1. STATEMENT OF FACTS must be authenticated during the term of the court unless during the term an order was entered of record allowing the statement to be prepared and filed within ten days after the adjournment for the term; and on appeal the order must be brought up in the record, or this court cannot recognize for any purpose a statement approved after the adjournment of the trial court.
2. PRACTICE IN THIS COURT.—When no authentic statement of facts appears in the record, but a proper bill of exceptions shows that there was no proof of the venue of the offense, or no sufficient identification of the defendant as the culprit, this court must assume the verity of these defects in the proof, and will set aside the conviction.

APPEAL from the County Court of Delta. Tried below before the Hon. JOHN D. POLK, County Judge.

The conviction was for aggravated assault upon a woman who weighed two hundred and fifty pounds, and the penalty was only a \$25 fine,—just ten per cent.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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WINKLER, J. Agreeably to the record before us, the County Court of Camp county, before which the appellant was tried and convicted, convened on August 1, 1881, and adjourned on August 4, 1881. There is embodied in the record what purports to be a statement of facts; this, however, purports to have been approved by the judge and filed on August 8, 1881, and not until after the court had adjourned. In this statement the venue is not proven. By article 784, Code of Procedure, it is provided that a statement of facts may be drawn up and certified and placed in the record as in civil suits. By the Revised Statutes, articles 1377 and 1378, provisions are made for the mode of preparing statements of facts, and prescribing the duties of the presiding judge in case the parties do not agree as to the facts. Article 1379 provides that "The court may, by an order entered upon the record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding ten days after the adjournment of the term."

To permit a statement of facts to be made up, signed and filed in vacation, the law requires that such a course be provided for by an order, entered upon the record during the term. Except time be allowed for the purpose, before the expiration of the term, the law contemplates that a statement of facts shall be prepared, signed by the necessary parties or certified by the judge, as the case may be, before the adjournment of the court for the term. Unless the statement of facts has been prepared in either one or the other manner, we are not authorized to consider it on appeal for any purpose; and in such a state of case the uniform practice is to disregard what purports to be a statement of facts, entirely, and decide the case upon the balance of the record.

In the present case we find a bill of exceptions which is signed by the judge who presided at the trial, and in which are found the following statements: "That the

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State failed to prove the venue of the said offense; that it was not proven that the offense was committed in the State of Texas or the county of Camp. The State did not prove that the defendant was an adult male." We must presume that these statements are true, finding them so stated in the bill of exceptions signed by the judge, and which was filed August 3, 1881, and during the term. The case was tried before the court without a jury. The absence of the testimony mentioned in the bill of exceptions entered into the defendant's motion for a new trial, which was overruled.

Because of this failure of the testimony the case was not proved against the defendant, and a new trial should have been granted. The judgment will be reversed and the case remanded.

Reversed and remanded.

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DAVID KEMP v. THE STATE.

1. GRAND JURY — CHALLENGE TO THE ARRAY OR TO ANY MEMBER of a grand jury is authorized by the Code of Procedure, but it defines the only causes for challenge and explicitly requires the challenge to be made before the grand jury is impaneled,—securing to a prisoner in the county jail the right, upon his request, to be brought into court to make the challenge. *Held*, that by these provisions the right to impeach the qualifications or the legality of a grand jury is limited to the time prescribed and confined to the causes specified; and a prisoner who has omitted to request that he be brought into court to make the challenge cannot impeach the grand jury by pleading in abatement of the indictment preferred against him.
2. SAME — CASE STATED.—To an indictment for murder the defendant pleaded in abatement that he was in jail when the grand jury was organized; that he was a friendless minor without means to employ counsel, and had no counsel until after the indictment was presented; that he was not apprised of his right to challenge the array or any member of the grand jury; that the persons composing it

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were not selected for the term by the jury commissioners, nor was the list of them certified by the commissioners as required by law; that the envelope containing the list was not properly indorsed, and was opened by the clerk before he was authorized by law to open it; that the grand jurors were summoned by an unauthorized person, and that one of them was a principal witness against the defendant. *Held*, that the plea was properly overruled. See the opinion for a collocation of the articles of the Code of Procedure which control the subject.

3. **SAME — PRACTICE.** — Unless requested by a prisoner confined in the county jail, the opportunity to challenge the grand jury is not a matter of right; but with a view to the prevention of improper prosecutions, the practice of affording such prisoners an opportunity to challenge the grand jury is one to be commended.
4. **CHANGE OF VENUE — PRACTICE.** — The trial judge commenced his charge to the jury by informing them that the homicide was committed in another county, and that "the case is in this court by change of venue." Objection to this is based on the fact that the transcript of the proceedings of the court *a quo* had not been filed in the trial court. *Held*, that the judge was fully warranted in apprising the jury of the *status* of the case, and the omission to file the transcript was a mere irregularity which was amenable to subsequent correction.
5. **CULPABLE HOMICIDE — DEFENSE OF SELF OR OF ANOTHER.** — The cases of *Guffee v. State*, 8 Texas Ct. App. 187, and *Foster v. State*, *Id.* 248, cited and approved with respect to the distinctions between the degrees of culpable homicide, and upon the amenability of one who, having interfered in a combat between his friend and the deceased, becomes involved in it and kills the latter.
6. **MURDER IN THE FIRST DEGREE — EVIDENCE.** — Note the proof which, on this appeal from a capital conviction, is held insufficient to show that the killing was upon express malice.

APPEAL from the District Court of Coryell. Tried below before the Hon. T. L. NUGENT.

In May, 1881, the grand jury of Hamilton county presented an indictment which charged David Kemp, the appellant, with the murder of F. A. Smith, on the 2d of said month, by shooting him with a pistol. By change of the venue, the cause was transferred to the District Court of the adjoining county of Coryell, and in the ensuing month of June a trial was there had, and the ap-

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pellant was convicted of murder in the first degree, and his punishment assessed at death.

Upon the fact that F. A. Smith, the deceased, was shot and instantly killed in the town of Hamilton, by the appellant, on the 2d of May, 1881, there was no controversy. The appellant and Dan Bogan, his friend, had been in town for several hours, and the latter, it appears, had been drinking during the day. The affray in which Smith was killed took place close by Cropper's store, which was situated on the north side of the public square, near the northeast corner, and fronted south. Along the east side of the store-house was a highway, running north and south. Until the circumstances which precipitated the conflict, it seems that the antagonists were entire strangers to each other.

F. L. Cropper, the proprietor of the store, was the first witness introduced by the State. He was standing in the front door of his store and witnessed some of the shots which were fired, but not the one which killed the deceased. The witness had known the appellant and Bogan, but did not learn who the deceased was until after his death. As witness stood in his door Bogan walked up to him, using pretty rough language. While Bogan was there the appellant rode up, riding one and leading another horse, and said to Bogan once or twice, "let's go home." Bogan then went into Perry's drug-store, which adjoined witness's place on the west, and from the drug-store walked to the side of the horse which the appellant was leading. Bogan stood there and seemed to be fixing the saddle or something. A post stood about twelve feet from the southeast corner of the pavement and in front of the southeast corner of the store-house. For several hours before the affray, the wagon of the deceased had been standing in the highway on the east side of the store, and just before the affray he drove it along the side and towards the front of the

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store until the heads of his horses got between the post and the pavement, and close to Bogan and the appellant, who were thus brought immediately in front of the deceased's team, the appellant being on his horse and Bogan standing on the ground. The deceased spoke very mildly to them or to some one, and requested the removal of their horses; witness could not remember the exact language of the deceased. Appellant made no reply to the deceased, but Bogan commenced swearing at him. Deceased then said to Bogan, "If it wasn't for the name of whipping a dog, I would get out and whip you;" and Bogan continuing to curse, this remark was repeated by the deceased. Bogan then passed around the post and to the east side of the deceased's wagon, took a chair out of it, flourished the chair as if to strike with it, and called the deceased a "G—d d—d son of a bitch" once or twice, and then put the chair back in the wagon. Just as Bogan replaced the chair the deceased got out of the wagon, walked up to Bogan, and, after standing there a while, said to him, "You will curse a man, but, when he gets out to fight you, you won't fight." Bogan ran his hand in his bosom, and the deceased said to him, "Draw your G—d d—d pistol and I'll knock you down." Bogan drew his pistol, and the deceased struck him. Just after Bogan stepped to the side of the deceased's wagon, the appellant got off his horse and tied its bridle reins and those of the led horse together, and then went around the post to a point close to the east hind wheel of the deceased's wagon. As the deceased got out of the wagon, Bogan backed off a piece and the deceased advanced to where Bogan was. Bogan faced north and the deceased south, and they were close together. About the time the deceased struck Bogan, the appellant had moved around to a position about seven or eight feet to the east of Bogan and the deceased. The blow staggered Bogan back seven or eight feet, his hat fell over his eyes, and the deceased followed

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him up and struck him again. At the second blow Bogan fell, with his pistol in his right hand. Deceased kicked and struck the pistol, or reached with his left hand and knocked it, out of Bogan's hand, and several feet away to deceased's left, and then with his left hand caught Bogan by the shoulder, and was in the act of striking him with his fist, when the appellant ran up from behind and with his pistol struck the deceased on the head, the blow glancing to his shoulder. The force of the blow discharged the pistol, and the deceased then seized Bogan's pistol and turned, and after he turned the appellant shot at him. The shot, however, on account of some defect in the load or cartridge, was what witness called a squib. The deceased advanced and with the pistol struck the appellant's arm and knocked it down. The appellant raised his arm and in doing so fired his pistol, and then the deceased again struck down the arm of the appellant, who again fired a squib. All this time the appellant, holding his pistol in front of him, was backing and trying to shoot as he backed, and the deceased was following him up and striking with Bogan's pistol at the appellant's arm. The appellant fired several times; the deceased did not attempt to shoot at all.

On his cross-examination Mr. Cropper testified that while Bogan was talking to him at the door of the store, the appellant said to Bogan, two or three times, "Come, let us go home." Bogan was drunk.

On the re-examination the witness stated that he did not hear appellant say anything to Bogan after the latter commenced the quarrel with the deceased, which began probably five minutes after appellant asked Bogan to come and go home. Bogan was not very drunk; he was under the influence of whisky but could walk straight. After the fourth shot the witness got behind his door, and immediately after the fifth was fired he looked out and saw the deceased falling. Within a few minutes the deceased died.

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Thomas Emmett, for the State, testified that he occupied a shop on the east side of the public square in Hamilton, and about thirty or thirty-five yards from Cropper's store. Just before the affray he noticed Lochlin and the deceased as they passed in the direction of Cropper's store, and heard the deceased say "I will go get my wagon, and drive down and put our things in it." A few minutes afterwards the witness saw the appellant ride by towards Cropper's store, leading a horse. He rode up in front of Cropper's store, and Bogan was standing there on the pavement, cursing. Mr. Gentry and Mr. Law passed into the store, and as they did so Bogan said, "I can whip any G—d d—d man in town; can't I, Law?" The deceased then came driving down the east side of the store, and as his horses got between the pavement and the post he spoke to some one in an ordinary tone of voice, but witness could not distinguish the words. Immediately the witness heard Bogan say "Go to hell," and at once started to the parties. When Bogan said "go to hell," the deceased replied, "You can go there yourself." Bogan replied, "If you get out of that wagon I'll whip you;" and the deceased said, "Yes, anybody can whip me in town, but if you were out in the country I would whip you like a dog." They then had a general cursing match. Bogan went around the post to the east side of the wagon, and after a little took a chair out of the wagon, struck it on the ground and put it back in the wagon, and called the deceased a d—d son of a bitch. The deceased threw off his coat and hat, and got out of the wagon. Bogan backed a step or two, and the deceased, advancing, said "You d—d ——, you won't fight nothing." Bogan commenced drawing his pistol from under his coat, and witness said "Don't Dan," and motioned to him not to draw his pistol. He smiled and put his pistol back. The deceased said, "if you draw that pistol, I'll knock you down." Bogan drew his pistol out, and the deceased

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struck him on the chin, knocked him back, and his hat fell over his eyes. The deceased again struck Bogan, and the latter fell. In the meantime the appellant had dismounted, and when Bogan fell drew his pistol and ran up and struck the deceased over the head with it. Deceased rose, with Bogan's pistol, and as he did so the appellant fired at him, the discharge being a squib. Appellant backed about twenty steps, step by step, trying all the time to shoot the deceased, who followed him up and knocked appellant's pistol off, but did not try to shoot. Bogan picked up a large stone, came up behind the deceased, and struck him two blows with it on the back of the head and neck. The second blow seemed to paralyze the deceased; he stopped, stooped forward, and put his left hand to his head. His right hand was holding Bogan's pistol by the cylinder. At this time the appellant fired, and immediately leaned forward and fired again. The deceased seemed to recover himself, and threw the pistol at appellant with great force. Witness ran by the deceased to get the pistol and did not see him fall. The pistol struck the appellant on the neck, glanced off, and went as far as across the court-house.

The cross-examination elicited but little more than a repetition of the direct testimony. The witness stated, however, that when the deceased began to get out of his wagon Shumaker rode up between the wagon and the store, took deceased by the arm, and seemed to be trying to persuade him not to get out. Neither Bogan nor the deceased called the other by name during the affray, and witness was confident they did not know each other. When the deceased got out of the wagon he said to Bogan, "D—n you, if you want to fight now is your time."

Thomas Bevins, for the State, testified that he was on the pavement in front of Cropper's store, when his attention was drawn to some words passing between Bogan

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and Cropper. The appellant, who was on horseback and holding another horse, asked Bogan two or three times to come and get on his horse, and go. Bogan went around to his horse as if to get on him. As the deceased drove down and got near the corner he asked some one of the three men who were there with horses, to please move up. The three men were Shumaker, Bogan and the appellant. Bogan asked the deceased who he was, and commenced walking around towards him, and cursing him at the same time. He gave the deceased the d—d lie, and the deceased returned it. Bogan said he could whip any man in Hamilton county, and deceased said "it's a lie." Bogan took a chair out of the deceased's wagon, struck it on the ground, and put it back; and then called the deceased a stinking son of a bitch. Deceased said he wouldn't take that, got up, pulled off his coat and hat, and got out of the wagon. The remaining incidents were related by this witness in substantial accordance with the testimony of the witnesses who had preceded him. He stated, however, that the appellant, when he fired the fatal shot, put his pistol so close to the breast of the deceased that the discharge powder-burned the latter's clothes. The ball passed through his breast and came out at his back. When the deceased threw his pistol at the appellant it struck the latter on the neck and fell just beyond him. Deceased did not throw it but a little ways. Appellant ran off and was pursued by Mr. Gentry, and twice snapped his pistol at Gentry.

The prosecution examined two other witnesses in chief to the incidents of the affray, but their testimony was not so full and circumstantial as that already detailed. One of them stated that the deceased was a tolerably stout, active man, and weighed about 175 or 180 pounds, and that Bogan weighed about 155.

B. T. Howard was the first witness introduced by the defense. He witnessed the affray in which the deceased

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was killed. While standing on the pavement and near the southeast corner of Cropper's store, his attention was attracted by Bogan saying he could whip any man in town who had anything against him. He said this two or three times. The deceased drove down to near the corner of the store, so that his horses' heads got between the post and the pavement. Bogan stepped off the pavement and went around the wagon and team, still saying that he could whip any man in town who had anything against him. He had the appearance of a man who had been drinking. Up to this time his remarks were general. The deceased said to Bogan, "I could whip you if I felt like it, and that d—d quick;" and then Bogan turned towards the deceased and for the first time addressed his remarks to him. He jerked a chair out of the wagon as if he was going to strike, and then put it back. Deceased jumped out of the wagon, and he and Bogan cursed each other and finally came to blows. When the deceased got out of the wagon he advanced on Bogan, who retreated as if to get out of the way. Finally the deceased struck, and the whole thing was so obnoxious to the witness that he got out of the way. Before the deceased got out of the wagon a man rode up and tried to keep him from getting out; and some one tried to get Bogan off. During the quarrel before the deceased got out of his wagon, Bogan was daring him to get out, and he was telling Bogan what he could do if he should get down. After moving away the witness heard two shots, very close together, and, looking back, saw the rush of the smoke from opposite directions. After those two shots but one more was fired. At the time of the affray the witness was not acquainted with either the deceased or the appellant.

On his cross-examination the witness stated that he did not see the pistols, nor recognize the parties who did the shooting. There was first one shot, then two in rapid

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succession, and it was when these two were fired that witness glanced round and saw the rush of smoke. It was near where Bogan had been knocked down, and some of it came from near where the deceased was, and some from another direction.

J. B. Wallace, for the defense, testified that he was in the town of Hamilton when the deceased was killed. There was a man standing in the street who was drunk, and trying pretty hard to get up a fuss; and he succeeded in getting one before he quit. The deceased drove up in his wagon and stared at the man for nearly half a minute, and Bogan looked at the deceased. Bogan said "I can whip you,— whip a dog," and continued abusing and cursing the deceased very roughly until the latter got out of the wagon. Bogan got a chair out of the wagon, struck it on the ground, and put it back in the wagon. He called the deceased a d—d son of a bitch, a stinking son of a bitch, and so forth, and backed back. The deceased, when he got out of the wagon, advanced on Bogan and said "You are a d—d rascal; will fight nothing,"—holding his left hand up and shaking it in Bogan's face. Bogan put his hand to his side, and the deceased said "if you pull that pistol I will knock you down," and immediately struck Bogan and knocked him down. It was a powerful blow. The deceased then wrenched Bogan's pistol out of his hand, straightened himself up and stepped back. This witness's testimony stops at this stage of the affray.

J. T. James, for the defense, testified that he was in Perry's drug-store, adjoining Cropper's store, when he heard a fuss and went to the door. Deceased was sitting in his wagon, holding the lines; Bogan was on the east side of the wagon, with a chair drawn as if to strike. He was cursing the deceased, and called him a d—d liar. Deceased sat and took it a while, but all at once stood up in the wagon, pulled off his hat and coat, got out of the wagon and squared himself as if to fight. He said he

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hated to whip a d—d stinking, beardless cuss like Bogan, and all at once struck Bogan on the left cheek, staggering him back, and then struck him again and knocked him down,—knocked him about ten feet. Bogan fell on his back, with his pistol drawn. The deceased took the pistol out of Bogan's hand, stepped back, and raised the pistol as if to strike, saying "G—d d—n you." He seemed to reconsider it, however, and lowered his hand a little. Just then the witness saw some one beyond with a pistol drawn, and, suspecting he might be in range, he left.

E. Shumaker, for the defense, testified that when he rode up the deceased and Bogan were quarreling, and he took the deceased by the arm and told him not to have any row. Bogan and the deceased were using pretty rough language, not precisely remembered by witness, but something was said between them about a "low-flung dog,—wouldn't fight." Deceased's wagon was twenty-five or thirty feet from Cropper's pavement, and Bogan was on the other side of it from witness. When the witness took hold of the deceased, Bogan was backing off from the wagon. The appellant was standing beyond and east of Bogan. Deceased said to witness, "turn me loose," got out of his wagon and knocked Bogan down, took Bogan's six-shooter and raised it up; and then the appellant ran up and with his six-shooter struck the deceased over the head. When the deceased struck Bogan, the latter was giving back. When the appellant ran up and struck the deceased, the latter had the six-shooter raised as if to strike, and was not entirely up from over Bogan, who was flat on his back. When the appellant struck the deceased his pistol went off. Appellant gave back, and the deceased followed him with his pistol in his hand, knocking with it or trying to shoot. Several shots were fired. Appellant backed eight or ten steps before the deceased was killed. The appellant is seventeen or

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eighteen years of age; he and Bogan were friends, and the witness thought the appellant was going to marry Bogan's sister. On the cross-examination the witness stated that he was distantly related to the appellant.

Three other witnesses were examined by the defense, and their testimony in several material respects corroborated that already narrated on the same side.

In rebuttal two witnesses for the State testified that they examined the two pistols after the affray. Every barrel of the one used by the appellant had been discharged. Of the one taken from Bogan by the deceased only one barrel was empty, and there was no cartridge-hull in it, nor sign of fresh powder-burn; but on the contrary the empty barrel had dust in it.

The opinion discloses the matters of fact germane to the rulings on the questions of practice.

Vardiman & Atkinson, G. P. Miller, and Eidson & Pierson, for the appellant. The first point which we will discuss presents a jurisdictional question, and is raised by our supplemental assignment of errors, and is, the court erred in instructing the jury that this case was in the District Court of Coryell county on a change of venue from Hamilton county, when no transcript from Hamilton county had been filed in the District Court of Coryell county, and no evidence was offered showing or tending to show that the last named court had any jurisdiction of the case.

It is an elementary principle of criminal law that the venue must be proven. It is unnecessary to cite authority on this point. The reason why it is necessary, is to show that the trial court has jurisdiction of the case. It occurs to us that where the venue has been changed the statement of facts should show affirmatively that the court trying the case had jurisdiction. The District Court of Coryell county could not judicially take notice

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of the records of the District Court of Hamilton county. Neither could the District Court of Coryell county judicially know the contents of a paper purporting to be a transcript from the District Court of Hamilton county, but never filed and never offered in evidence. Neither the pretended transcript from Hamilton county nor the indictment upon which appellant was tried were ever filed in the District Court of Coryell county, hence that court had no jurisdiction of the case. Code Crim. Proc. art. 56; Rules of Practice, 2 Texas Ct. App. 677-80; *Richarte v. State*, 5 Id. 359; *Thompson v. State*, 4 Id. 44; *Beardall v. State*, Id. 631; 1 Bishop C. P. 1355.

We now proceed to the discussion of the errors presented in our original assignment. The first of which is, the court erred in overruling defendant's plea in abatement, as shown by bill of exceptions. There are several grounds relied on in this plea, the most important of which are as follows:

1. The grand jury that found the bill of indictment was not a legal grand jury; they were selected for the April term, 1881, and not for the May term, 1881. (Code Crim. Proc. arts. 357, 359.) Even under the law in force at the time of their selection the next term of the court would not have been the April term, but the May term, and it would have come on the 2d day of May, 1881. (Gen'l Laws 16th Legislature, 14.) Hence the contingency provided for in art. 367, Code Crim. Proc., occurred, that is, there was a failure to select a grand jury as directed in that chapter of the Code of Criminal Procedure, in this, they were not selected for the next term of the court, which was the May term, 1881, but for the April term, 1881, when there was no term of the court, either according to the old or new law, and the court should have proceeded as directed in art. 367, Code Crim. Proc.

2. The clerk of the District Court of Hamilton county opened the envelope containing the list of said grand

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jurors more than thirty days prior to the term of the court at which the indictment was found, it being the next term of the court. They were opened on the 2d day of April, 1881, and said next term of court began the 16th day of May, 1881. (C. C. P. art. 363.) In our view this article is mandatory; the language is, "within thirty days of the next term of the District Court, and *not before*, the clerk or one of his deputies shall open the envelope." And we are strengthened in this view by the requirements of art. 361, C. C. P., which provides that the clerk, before the list is delivered to him, and each of his deputies, shall make oath that he or they will not open the same before the time prescribed by law. And deputies subsequently appointed are required to take the same oath. (C. C. P. art. 362.) The envelope containing the list was opened forty-three days before the next term of the court, instead of thirty. And at the time the clerk opened it the law changing the time of holding the court had gone into effect. (Gen'l Laws 17th Leg. '78, '79.)

3. Said grand jury was not summoned by an officer authorized by law to summon them. T. C. Pierson, who summoned them, had been appointed in writing a deputy sheriff of Hamilton county, and had taken the oath of office, but the appointment and oath had never been recorded, as provided by law. Rev. Stats. art. 4520; *Alford v. State*, 8 Texas Ct. App. 545.

4. One of the grand jurors, Thomas Emmett, was a witness for the prosecution. His name was indorsed on the indictment as a witness for the State, and the statement of facts will show that he was the most material witness for the prosecution.

5. The defendant was not allowed the privilege of challenging the grand jury or any member of the same. (C. C. P. art. 377; *Reed v. State*, 1 Texas Ct. App. 1.) While none of these grounds are laid down in our Code of Criminal Procedure, as causes for challenges either to

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the array or any member of the grand jury, still we think they constitute violations of the defendant's rights, and for which the courts should afford him some remedy. (Bishop's Crim. Proc. 1st vol. 872.) And when the objection cannot be taken by challenge, the common method is by plea in abatement. (Id. 885.) "And where the court does not hold that a waiver has taken place, this plea may show that the jury consisted of too many members or too few, or that it was *otherwise incompetent*. Even an irregularity in the summoning or impaneling of the jury or selecting of the jurors may in those circumstances be taken advantage of in this way." Id. 884. And we submit that no waiver took place in this case. The defendant was arrested immediately after the act was committed and placed in jail, and was confined therein continuously from that time up to and during the time when the grand jury was organized. He was a mere youth, and was unable to secure counsel till after the indictment was found, and did not know that the law would require him to be brought into court at the organization of the grand jury upon his request. Suppose he was brought before the magistrate and waived an examination, as the learned judge below suggests in explanation to our bill of exceptions, that would not indicate that he knew of his right to be present at the organization of the grand jury on his request. It was only two weeks from the time the act was committed till the next term of the District Court, when the grand jury were organized, and no doubt the magistrate or some one else present told him that the grand jury would have to act on the matter in any event, and since the time when they would meet was so near it would be useless for him to go into an examining trial. And the fact that the defendant had numerous friends, among whom was the sheriff, signified nothing unless they or some one of them knew of this right of defendant and advised him of it. The

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right of a defendant confined in jail to await the action of the grand jury to be present at the organization thereof upon his request is by no means generally known among the ordinary citizens; this right has only been accorded him by statute since the Revised Statutes went into effect.

The next assignment of error to which we will direct the attention of the court is, the court erred in its charge on express malice. That part of the charge of the court on express malice is erroneous, as follows: "The law, however, does not require that such design or intention should, when once formed, exist for any definite or prescribed period before it is put into execution, nor that it should exist prior to the occasion upon which the homicide is committed. If, in fact, it be deliberately formed in the mind of the slayer and be executed by him when his mind is sufficiently cool to consider of and comprehend the nature and consequences of the act about to be committed, express malice will exist, however short the space of time between the formation of the design and its actual execution in the commission of the homicide."

It is when the design to kill is formed that the mind should be sufficiently cool to consider of and comprehend the nature and consequences of the act. *Farrer v. State*, 42 Texas, 265. Another objectionable feature of this charge is, it gives too much prominence to the idea that, though the act was committed suddenly, still express malice could exist. It is calculated to impress on the minds of the jury that, in the opinion of the court, though the homicide was the result of a sudden quarrel, there was proof of express malice. *Johnson v. State*, 43 Texas, 612; *Stuckey v. State*, 7 Texas Ct. App. 174; *Renfro v. State*, 9 Id. 229; *Brown v. State*, 23 Texas, 201; *Ross v. State*, 29 Texas, 501. That part of the charge on express malice which instructs the jury that, "however sudden the killing may be," etc., is also objectionable because

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tantamount to a charge on the weight of evidence. *Johnson v. State*, 43 Texas, 412.

The court erred in charging the jury as follows, to wit: "But on the other hand if such external circumstances indicate that the intent to kill was conceived and executed in a transport of passion, or under the influence of sudden terror or excitement, when the mind was incapable of cool reflection, or that it was the offspring of a mind incapable from any cause of considering and weighing the consequences of the act about to be done, express malice cannot in law exist." We think the jury were led to believe by this instruction that they were authorized to find the defendant guilty of murder in the first degree, unless they believed from the evidence that the act was committed in a transport of passion, etc., thereby throwing upon the defendant the burden of disproving express malice, whereas the mere absence of proof of express malice reduces the homicide to murder in the second degree. If express malice is not proven, and no circumstances of justification, mitigation or excuse appear, it is murder in the second degree. *Harris v. State*, 8 Texas Ct. App. 90; *Summers v. State*, 5 Id. 359; *Farrer v. State*, 42 Texas, 265.

The 7th, 8th and 9th assigned errors relate also to subdivision 10 of the general charge. This instruction is the only one relating to murder in the first degree as applied to this case given to the jury, and is the charge upon which they found their verdict. The first sentence of said subdivision is as follows: "If the defendant is guilty of murder at all, the degree of his guilt will depend upon the state of his mind or the intent with which he committed the homicide." In this sentence the intent of the defendant is made equal in effect to the condition of his mind. Express malice is never presumed from the intent alone. *Farrer v. State*, 42 Texas, 265; *Primus v. State*, 2 Texas Ct. App. 369. Another objection to this charge

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is, it virtually usurps the province of the jury by instructing them that defendant committed the homicide. *Walker v. State*, 42 Texas, 371; *Stuckey v. State*, 7 Texas Ct. App. 174. Again, nothing is said in said subdivision as to the intent with which Bogan sought or brought on the difficulty therein referred to. In order to have made defendant guilty of murder in the first degree it was necessary that Bogan should have sought and brought on said difficulty with express malice, and that defendant, *knowing such intent*, should have joined in and made himself a party thereto with the intention in his mind, deliberately formed, either to kill Smith or inflict on him some serious bodily injury which in its necessary or probable consequences might end in death, and if in the further progress of said difficulty, while his mind was in a condition to consider of and comprehend the nature and consequences of his acts, appellant shot and killed Smith, such killing would have been murder in the first degree. *Guffee v. State*, 8 Texas Ct. App. 187.

Appellant's knowledge of the origin and nature of the difficulty is not equivalent to his knowledge of the intent of Bogan. He may have seen the beginning of the difficulty, and heard or seen everything that occurred from that time to the end of the difficulty, and still not have known the intent of Bogan.

There was no evidence authorizing this charge. Appellant made no attempt to kill Smith until the latter turned on him with a pistol, and the fatal shot was not fired until deceased, who was a larger and more powerful man, had forced him to retreat thirty steps at the muzzle of a large pistol. To expect coolness and deliberation from a man under these circumstances is requiring too much of human nature. *Burnham v. State*, 43 Texas, 322; *Hamby v. State*, 36 Texas, 527; *Primus v. State*, 2 Texas Ct. App. 378; *Cox v. State*, 2 Texas Ct. App. 500.

The 10th assignment relates to the charge on murder in

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the second degree, and here we submit that this portion of the charge does not properly distinguish between murder in the second degree and manslaughter. *Maria v. State*, 28 Texas, 698; *Lindsey v. State*, 36 Texas, 337. There was no evidence that defendant acted "under circumstances which are the ordinary symptoms of a wicked, depraved and malignant spirit, of a heart regardless of social duty and fatally bent on mischief," and this portion of the charge, having no application to the facts, should not have been submitted to the jury, as it could afford them no light and was calculated to mislead them. The court also instructed the jury that if appellant, "from whatever motive, engaged in and made himself a party to such difficulty," etc. This instruction authorized the jury to look for the motive of defendant outside of the evidence. The jury should also have been instructed that if Bogan and Smith became engaged in a personal combat, and if appellant seeing said difficulty conceived in his own mind the determination to kill Smith if the latter should make an assault on Bogan, and if in pursuance of said determination he engaged in said difficulty when said assault was made, and in said difficulty shot and killed Smith, then he would only be guilty of murder in the second degree. *Guffee v. State*, 8 Texas Ct. App. 187.

The 11th assigned error relates to the charge on manslaughter, and will be next considered. And here we find no definition or instruction as to what would constitute adequate cause as applied to the facts of this case. The jury were left to their own opinion without any guidance from the court as to what facts if proven would constitute adequate cause under the law. The court charged the jury that "if the facts set out in paragraph 16 were adequate cause to produce," etc. We think this was error because the jury, although they might believe those facts produced in the mind of defendant such sudden terror, anger, rage or resentment as to render his

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mind incapable of cool reflection, still it was left to them to determine whether or not these circumstances constituted adequate cause as contemplated by the statute. The court should have charged the jury that an assault and battery causing pain is an adequate cause. The proof shows that deceased was a stouter man and struck down Bogan. *Hill v. State*, 8 Texas Ct. App. 142; *Reed v. State*, 9 Texas Ct. App. 316. The same rules which regulate the conduct of the person about to be injured in repelling the aggression are applicable to the conduct of him who interferes in behalf of such person. C. C. P. art. 72. The court should have charged the jury that the striking and knocking Bogan down (if the same was done) by Smith if Bogan was a friend of defendant was sufficient legal provocation to reduce the homicide from murder to manslaughter, if in consequence thereof defendant was in fact so enraged as to be incapable of cool reflection, and while so enraged shot and killed Smith. *Guffee v. State*, 8 Texas Ct. App. 203; *Maria v. State*, 28 Texas, 698; 1 Russell on C. 795-6; *McLaughlin v. State*, 10 Texas Ct. App. 340.

H. Chilton, Assistant Attorney General, for the State. The first point raised in appellant's brief is not presented so as to require revision. It is substantially a plea to the jurisdiction of the District Court of Coryell county. Such plea cannot be interposed for the first time in the new tribunal. Art. 584, Code Crim. Proc.; *Krebs v. State*, 8 Texas Ct. App. 1. Where an indictment is preferred in one county and defendant is tried in another county, the record not showing a change of venue, the presumption will be that there was a change of venue. *Doty v. State*, 6 Blackf. (Ind.) 520. And it will be presumed that the venue was rightly changed. *Hall v. Jackson*, 3 Texas, 308. The law does not require the transcript from the one county to be filed in the other. Code Crim.

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Proc. art. 585. This is not like the charge of the court (*Richarte v. State*, 5 Texas Ct. App. 359; *Thompson v. State*, 4 Texas Ct. App. 44) which the statute, in terms, requires to be filed. Code Crim. Proc. art. 680. This I think is an ample answer to the present objection. However, if necessary, an answer yet more decisive will be found in the fact that a complete record from Hamilton county was filed June 21, 1881. If the first transcript from Hamilton county lacks verity (which I cannot admit), the omission is fully cured by the subsequent certificate. If the facts existed, at the proper time, it does not matter that the mere evidence of the facts was afterwards produced.

The objections to the grand jury were both untimely and untenable,—untimely, because by express statute a challenge to the array, or to any particular grand juror, must be made before the jury is impaneled, and in no other way shall objections to the qualifications and legality of the grand jury be heard. Code Crim. Proc. art. 377. Not only does this article of the Code speak explicitly on the subject, but the decisions are uniformly to the same effect. *Thompson v. State*, 2 Texas Ct. App. 550; *Cordova v. State*, 6 Texas Ct. App. 207.

If the objections had been duly presented, they would have been ineffectual. The law enumerates the grounds of challenge to the array and to each juror, and declares without qualification that challenges shall be made for those causes only. Code Crim. Proc. arts. 380, 381; *Green v. State*, 1 Texas Ct. App. 82; *West v. State*, 6 Texas Ct. App. 485.

The term of the court for which the grand jury was selected was deferred or changed by legislative enactment, and the defendant could with more plausibility have made complaint if the judge had failed to recognize the juries selected at the last term of the court theretofore. The regulation concerning the opening of the list is

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purely a direction, although a right is thereby conferred which cannot be disregarded with impunity. In this case the action of the clerk is so clearly and reasonably accounted for that it is deemed unnecessary to discuss the point further. The acts or authority of an officer are not subject to be attacked as was attempted in this case. The validity of a criminal trial cannot be undermined or delayed by such collateral inquiries. It is enough that Pierson was an officer *de facto*. A bill of indictment cannot be retroactively destroyed by reason of the summoning of one of the grand jurors as a witness for the State.

The charge of the court, taken as a whole, and in fact viewing its several parts abstractly, is a lucid, thorough and temperate statement of the law applicable to every phase of the case. Concerning the last part of the 5th subdivision of the charge, it is enough to say that the word "deliberately" is used before the word "formed." If it was, therefore, necessary to specify that the mind must be cool and sedate when the intent was formed, this sufficiently does so. But this objection is bad in substance.

Concerning the point adverted to from time to time in the brief, that the court assumes that defendant committed the homicide, no more need be said than that this was not a controverted question in the case. The witnesses on both sides show that defendant committed the homicide, and no defense based on a contrary supposition was attempted.

WINKLER, J. The appellant was indicted by the grand jury of Hamilton county, charged with the murder of F. A. Smith, alleged to have been committed in Hamilton county, Texas, on May 2, 1881. The case was not tried in Hamilton, but was transferred by change of venue to the county of Coryell, where a trial was had on June 11,

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1881, which resulted in a verdict of guilty of murder in the first degree and the assessment of the death penalty. Judgment being rendered in accordance with the verdict of the jury, and a motion for a new trial having been overruled, this appeal is prosecuted. Some of the main features of the transactions relating to the killing of the deceased and the indictment and trial of this appellant may be briefly stated as follows: On the day of the homicide the appellant Kemp and one Bogan were in the town of Hamilton. During the day the homicide was committed a quarrel ensued between Bogan and the deceased, leading on to a personal rencounter between them. Whilst these two, Bogan and the deceased Smith, were engaged and fighting together, the appellant Kemp interfered on the side of Bogan. The attention of Smith was drawn from Bogan to Kemp, and the contest then became one between Kemp, the appellant, and Smith, which continued between them until Smith fell from a pistol shot fired by the appellant Kemp.

The circumstances of this case in many of its controlling features bear such analogy to the cases of *Guffee v. State*, 8 Texas Ct. App. 187, and *Foster v. State*, Id. 248, that the rules of law enunciated in those cases will apply in the main to the one now under consideration; so that, in so far as the law of this case has been settled in the cases referred to, we will content ourselves with the rules there laid down rather than enter upon an extended examination of authorities upon which the rules deduced appear to rest. We are not inclined to the opinion now that further investigation would result in any material change, for the reason that those cases when before this court were decided after very careful consideration of the best accessible authorities on the questions involved and from which our conclusions emanated.

In the present case, however, there was a matter preliminary to the trial and prior to the change of venue

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which will have our first attention. The defendant pleaded in abatement of the indictment presented against him. In the plea the defendant avers that he was confined in jail at the time the grand jury which presented the indictment against him was organized and impaneled, that he was a minor without means to employ counsel and had to depend upon friends for the means of employing counsel, and in fact had no counsel to represent him until after the indictment had been found and returned into court; that he did not know nor was he informed of the time when the grand jury would be organized, or that he even had the right to challenge the array or any individual member of the grand jury; that the persons composing the grand jury were not selected by the jury commissioners for the term of the court at which they found the indictment; that the list was not certified by the jury commissioners as required by law; that the envelope which contained the list was not properly indorsed; that the clerk had opened the envelope more than thirty days prior to the time of the meeting of the court, *i. e.*, that it was opened April 2, 1881, and the court did not meet until May 15, 1881; that the grand jury was summoned by a person unauthorized by law; and that one member of the grand jury was one of the principal State's witnesses in the prosecution against him. The court below overruled the plea and the defendant excepted.

Aside from the statement appended by the presiding judge to the bill of exceptions to his ruling on the plea, which appears to explain in a very satisfactory manner the objection to the grand jury, the opening of the envelope, and the official capacity of the officer who summoned the grand jury, and the like, we are of opinion the correctness of the rulings of the judge on the plea must be determined and stand or fall by a proper interpretation and application of several articles of our Code of Procedure as we find them to be since the last revis-

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ion, and which were in force at the time of the trial on the plea in question. By article 376 it is provided that when twelve qualified jurors are found to be present the court shall proceed to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular individual presented to serve as a grand juror. The next succeeding article directs the time and manner of making a challenge, and succeeding articles prescribe causes of challenge to the array or to an individual grand juror.

In order that we may be fully understood we quote the language of the several articles. "Art. 377. Any person, before the grand jury has been impaneled, may challenge the array of jurors or any person presented as a grand juror, and in no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in the jail of the county shall, upon his request, be brought into court to make such challenge. Art. 378. By the array of grand jurors is meant the whole body of persons summoned to serve as such, before they have been impaneled. Art. 379. A grand juror is said to be impaneled after his qualifications have been tried and he has been sworn. By the word 'panel' is meant the whole body of grand jurors. Art. 380. A challenge to the array shall be in writing, and for these causes only: 1. That the persons summoned as grand jurors are not in fact the persons selected by the jury-commissioners. 2. In case of grand jurors summoned by order of the court, that the officer who summoned them has acted corruptly in summoning any one or more of them. Art. 381. A challenge to a particular grand juror may be made orally, and for the following causes only: 1. That he is not a qualified grand juror. 2. That he is the prosecutor upon an accusation against the person making the challenge. 3. That he is related by consanguinity or affinity to some person who has been held

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to bail, or who is in confinement upon a criminal accusation." It will be noticed that the language of these articles differs from corresponding articles of the Code as in force prior to the revision, and it seems that article 401 of the old Code (Pasc. Dig. art. 2868) has been entirely omitted from the revision, and is no longer in force. We are of opinion, however, that the substance of the omitted article is virtually embraced in the enlarged provisions we have quoted, as will be apparent by comparing the articles now in force with the corresponding articles of the former Code.

It will be seen from the articles quoted that there are but two causes of challenge to the array, and, agreeably to article 380, these are the only challenges to the array the law permits. Also, with reference to a particular juror, there are enumerated and specifically named three causes of challenge, to the exclusion of every other, by article 381.

This is not all. The causes of challenge are not only enumerated, and declared to be the only challenges the law permits either to the array or to an individual grand juror, but the time at which these challenges must be made is limited to a particular stage of the proceedings. They must be made before the grand jury has been impaneled; and not only so, but the law further declares that in the way here pointed out and *in no other way shall objections to the qualifications and legality of a grand jury be heard.*

Hence our conclusions are that the qualifications as well as the legality of a grand jury cannot be questioned after the grand jury shall have been impaneled; that, if there be any cause of challenge, such cause must be made available in the manner pointed out in the appropriate article, and before the grand jury is impaneled, but not after. The right of a prisoner confined in the jail of the county to make such challenge is limited to the time before the grand jury shall have been sworn. But further,

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a person so confined is entitled to be brought into court whilst the grand jury is being impaneled only *upon his request* of that privilege. If he does not make such request at the proper time, he is not permitted to complain afterwards. This is, we are of opinion, the proper interpretation and application of the several articles of the Code. It is too late to make any objection to the qualifications of a grand jury, or to the legality of a grand jury, after it has been impaneled and sworn.

There are other provisions of the Code of Procedure at present in force which it would be well to consider in connection with the general subject we have been discussing. "Art. 522. On the part of the defendant, the following are the only pleadings: 1. The motion to set aside the indictment or information. 2. A special plea setting forth one or more facts as cause why the defendant ought not to be tried upon the indictment or information presented against him. 3. An exception to the indictment or information for some matter of form or substance. 4. A plea of not guilty. 5. A plea of guilty. It will be seen that the causes which may be assigned in a motion to set aside an indictment or information, as provided for in clause 1 of article 522, are limited and restricted to the two grounds mentioned in article 523. The special pleas mentioned in clause 2 of article 522 are limited to the two mentioned in article 525; which are, 1, former conviction, and 2, former acquittal. The exception to an indictment or information must be for some matter of form or substance. The exceptions to the *substance* of an indictment or information are limited to the causes set forth in article 528, and exceptions to the *form* of an indictment or information are in like manner limited to causes enumerated in article 529. The other two pleas mentioned in the fourth and fifth clauses of article 522 are also defined and the pleading and practice described in other articles of the Code.

By a careful comparison of the defendant's plea in

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abatement it will be found that, as we have seen, those portions of the plea which call in question the organization or legality of the grand jury could only have been reached in the manner prescribed by the Code, and before the grand jury had been impaneled and sworn. Upon a further comparison of the plea with the articles of the Code as to what a defendant may plead, and the manner in which these several pleas have been circumscribed, it is apparent that the defendant by his plea did not bring himself within any provision of the Code which he could invoke for his protection. We therefore conclude that the court below did not err in overruling the plea in abatement.

It may be, however, that as a matter of practice it would not be amiss for the district judge, when about to organize a grand jury for any term of court, and when it can be done with safety, to have the prisoners confined in jail brought into court that they may have an opportunity to challenge the whole or any portion of the grand jurors before they are impaneled and sworn, and this for what seems to us still to be reasonable, as indicated in *Reed v. State*, 1 Texas Ct. App. 1; not as a matter of right, unless requested at the proper time, but as a matter of expediency, and an additional safeguard against an improper indictment.

There is another matter presented in the record and discussed in argument by the appellant's counsel which should not be overlooked. The judge in his prefatory remarks to the jury in effect told the jury that the case was on trial in Coryell county by change of venue from Hamilton county, and proceeded to charge the law of the case. It is not attempted to be shown that this was not the fact. The record discloses no statement as to any controversy over the regularity of the change of venue; but, even if it had been contested, for aught that appears from the record here, the action of the court was not

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only warranted but was eminently proper, and was fully warranted by art. 576, Code Crim. Proc. The controversy seems to have arisen from the fact that the transcript and papers from the court in Hamilton county had not been in fact filed in the District Court of Coryell county. This was at most but a mere irregularity, and could have been corrected at any time by direction of the court. Besides, we find in the record a motion made by the defendant's counsel which commences with the language: "And now comes the defendant in this cause by attorneys and shows to the court that the transcript filed in this court of the proceedings had in this cause in the District Court of Hamilton county is incomplete in this, that the proceedings had in this cause on the 25th day of May, A. D. 1881, in the District Court of Hamilton county is not included in said transcript; Wherefore," etc. The motion was very properly refused, agreeably to the statement of the judge appended to the bill of exceptions taken to his ruling. We are of opinion the record shows that the venue was properly changed from Hamilton to Coryell, and that the motion to amend the record, under the circumstances detailed by the judge, was properly refused, in that it deprived the defendant of no legal right that we can perceive. The preliminary remark of the judge was at most a harmless one, and did not form any part of the charge proper by which the case was to be determined.

To return to a consideration of the question involved in the main case as presented by the record. The circumstances under which the homicide took place, as detailed by the witness, invoked at the hands of the court clear and explicit instructions as to murder of the first and second degrees, or manslaughter, and on homicide in self-defense, as well as suitable instructions on the subject of the right of the defendant to intercede in behalf of his friend, and explaining the circumstances

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under which he might intercede and the extent to which the law permitted him to go in order to protect his friend as well as the consequences resulting to the defendant in case he carried his interposition to an extent not warranted by law. These are the main points arising upon the testimony and to which it became the duty of the judge to instruct the jury in his charge.

It is not shown by the evidence, except from circumstances, whether the defendant engaged with Bogan in the rencounter against the deceased, having a common intent to take the life of the deceased or to do him such bodily injury as might result in the death of the deceased. This was a pertinent and material inquiry to be submitted to the jury by the charge, the jury being left free to determine the question as the proof warranted. Another important inquiry was as to the condition of Bogan and the deceased at the very point of time at which it is shown by the testimony the defendant interfered, in order to determine whether the law permitted the interference of the defendant at that precise time, and to what extent the law authorized such interference on the part of the defendant. Another important inquiry is as to the result of a killing by the defendant after his interference on behalf of his friend. To our mind it appears with a considerable degree of clearness, from the statement of facts, that the defendant and Bogan were intimate friends at the time of the homicide; that they were together on that day in the town of Hamilton, where the homicide took place; that Bogan was under the influence of intoxicating liquor at the time he first met with the deceased; that the defendant was sober, so far as the testimony discloses, during the entire day. There is evidence tending to show that, prior to the time Bogan and the deceased engaged in the rencounter, the defendant endeavored to induce Bogan to go with the defendant home. The evidence tends to show that at the time of the rencounter both the defend-

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ant and Bogan were strangers to Smith, the deceased. When Bogan and the deceased commenced their quarrel, the deceased was in his wagon; that during an angry altercation which ensued between Bogan and the deceased the latter got out of his wagon on to the ground. A wordy altercation and mutual banterings to fight ensued, during which Bogan attempted to draw a pistol. The deceased told him if he did draw his pistol that he, the deceased, would knock him down. Bogan did draw, and the deceased did knock him down. Agreeably to the testimony, the defendant, who had been standing near, interfered, rushed up with his pistol in hand and seized the deceased by the shoulder with his left hand, and with his right hand struck the defendant a lick over the head with his pistol, the lick glancing to the deceased's shoulder. Just about this time the defendant rose and, with Bogan's pistol in his hand, turned upon the defendant, who commenced backing, and the deceased following him up with the pistol in his hand, the defendant keeping his pistol between himself and the deceased and endeavoring to fire upon the deceased, and the deceased with the pistol he had knocking at the pistol arm and hand of the defendant. Whilst thus retreating and advancing, some shots were fired by the defendant, a portion being what the witnesses call squibs, neither of which took effect until, while the parties were in this situation, the defendant fired the fatal shot and the deceased fell and died in a few moments. The testimony impresses us with the belief that Smith, the deceased, was a stout, athletic man and not afraid of a difficulty, but that he was unarmed until he procured Bogan's pistol, and that he did not intend or attempt to take the life of either Bogan or the defendant.

The charge of the court was very full and elaborate, and applies to every feature of the case as presented by the evidence. But, if there is any evidence at all of a

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knowledge of the defendant as to the motives which actuated Bogan in bringing on a difficulty with the deceased, such evidence was very meager indeed, and from the meagerness of the testimony as to whether there was any cooling time allowed the defendant under the circumstances by which he was surrounded, or whether he had time to form that sedate and deliberate mind necessary to constitute murder in the first degree, we are led to scan the charge minutely in order to determine whether in the charge (prepared during what must have been an exciting trial) there was embodied some clause which was calculated to mislead the jury. In taking up and reading the charge of the court, paragraph by paragraph, and considering each one separately in the light afforded by the appellant's brief, we are driven to the conclusion that the greatest objection to which any paragraph may be subjected does not amount to more than a harmless criticism upon the verbiage employed, and does not involve any erroneous statement of the principles of law in the particular instance complained of, or of which the defendant can reasonably complain; and, taking each paragraph separately or the whole charge collectively, we regard it as a full and complete elucidation of the law arising upon every deduction arising upon the evidence. The charge is not likely to mislead a sensible jury after a careful reading in its entirety. A discussion *seriatim* of the several objections urged in the brief and oral argument of the defendant's counsel would result in an unnecessary and unprofitable consumption of time. That portion of the charge on the subject of killing in defense of self or another is, in our opinion, exceptionally fair to the defendant. The line which separates the two degrees of murder was clearly defined, and in fact the general principles and definitions, and their application to the facts in the case, are alike free from objection, so far as we have been able to perceive. The charge also embraced

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the presumption of innocence and the reasonable doubt as to murder in the first degree, and between the two degrees of murder as well as between murder in the second degree and manslaughter, and as to whether the defendant was guilty of any offense whatever. Besides this there was a single charge asked by the defendant, which was given by the judge without modification or qualification, so far as the record discloses.

Yet, aside from all this, we are constrained to say that the evidence as to express malice is not sufficient to support a verdict of murder in the first degree. It is not sufficient as to the intent which actuated the mind of Bogan when he entered into the controversy with the deceased, nor to establish the fact that the defendant knew the intent with which Bogan entered into the rencounter. It is uncertain on the subject of the intent with which the defendant entered into the difficulty between Bogan and the deceased, and as to whether the defendant had cooling time from the time he entered into the difficulty until the homicide was consummated. The testimony on these vital points in the case is too meager to support a conviction of murder in the first degree with the death penalty.

We are of opinion the court below erred in overruling the motion for a new trial upon the evidence; and for this error the judgment will be reversed and the case remanded.

Reversed and remanded.

Statement of the case.

H. HIRSHFIELD v. THE STATE.

1. SWINDLING.—The Code of Procedure, article 794, provides that “when money, property, or other articles of value enumerated in the definition of swindling are obtained in such manner as to come within the meaning of theft or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines such other offense.” *Held*, that the effect of this provision is to invalidate an indictment for swindling if the allegations thereof charge facts which constitute a different offense.
2. SAME.—Appellant was prosecuted and convicted for swindling. The gravamen of the accusation was the procurement of money by means of a forged indorsement on his own check, and the indictment, though obviously framed on the definition of swindling, charged all the constituents of knowingly uttering a forged instrument; wherefore the defense excepted to it because, under the operation of article 794 of the Code of Procedure, the offense charged was not swindling but the uttering of a forged instrument. *Held*, that the exception was well taken and should have been sustained.
3. JEOPARDY.—Section 14, article 1, of the State Constitution ordains that “No person, for the same offense, shall be twice put in jeopardy of life or liberty.” *Held*, that the term “same offense” as here used does not signify the same offense *eo nomine*, but the same criminal act or omission. See the opinion *in extenso* on the subject of jeopardy.

APPEAL from the District Court of Dallas. Tried below before the Hon. G. N. ALDREDGE.

The charging parts of the indictment are set out in the opinion of this court. It concluded with an allegation that the intent of the appellant was “then and there to appropriate said money and property to the use and benefit of him the said Hirshfield, and to impair and destroy the rights of said Paschal Tucker in and to the same; contrary,” etc. The court below charged the jury that the trial was for the offense of swindling, and so instructed them upon the issues arising upon the evidence. The verdict found the appellant “guilty as charged in

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the indictment," and assessed his punishment at two years in the penitentiary.

The case is disposed of by this court on the law questions raised upon the indictment and the exceptions to it. There is consequently no occasion for a statement of the evidence. Matters relevant to the rulings are stated in the opinion; — but, as mentioned in the argument for the State, it may be stated that Tucker, alleged by the indictment to be the party injured, was the teller of the City National Bank of Dallas, and in that capacity discounted and cashed the appellant's check with funds of the bank. Tucker testified that he was not personally interested in the transaction.

Taylor & Sims and *Stemmons & Field*, for the appellant. I. The court erred in refusing to quash the indictment herein, on the ground that said indictment sets out an offense known to the law other than swindling; and defendant says that by reason thereof he cannot be prosecuted for swindling herein, or, in other words, the indictment having set out the offense of knowingly passing a forged instrument, that defendant must be tried for that offense. The verbiage of the indictment shows a case to be tried and punished under article 443, Penal Code, and the punishment there prescribed is not less than two nor more than five years. Can the accused be tried under the law of swindling, the punishment for which is double the amount provided by the Code as the punishment of the crime actually committed?

By article 794, Penal Code, it is provided that "When property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner as to come within the meaning of theft, or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which

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defines such other offense." The indictment shows that the offense actually committed by accused is known and defined by the laws of the State to be that of knowingly passing as true a forged instrument. Art. 443, Penal Code. The punishment of the crime actually committed is not less than two nor more than five years. The punishment in swindling is greater. Article 796, Penal Code, provides that the punishment in swindling shall be the same as that of theft. Article 735, Penal Code, provides that theft of the value of twenty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years. *Mathews v. State*, 33 Texas, 102; *Vestal v. State*, 3 Texas Ct. App. 649.

II. The court should have quashed the indictment by reason of the pleader failing to allege that the draft was presented for payment, and that payment was refused. The draft is set out in the indictment. It is shown to be payable at Eastland, Texas; the right of the accused to draw the draft is not negatived in the indictment, and there is no allegation therein that the draft was ever presented for payment and payment refused.

Had the genuine signature of Carnes been on the back of said draft, his undertaking as indorser thereon would be that the draft would be accepted and paid. His liability was contingent, and depended upon a refusal to accept and pay. If paid, there would be no swindling, as the party taking the draft must take it with knowledge that he must present it to the drawee before the indorser would be liable. An averment of presentation and refusal to pay is necessary before it can be determined that the party upon whom the instrument is passed has been swindled, or that there was upon the part of the accused, in the language of the Code, a wilful design to receive a benefit or cause an injury.

We respectfully ask a reversal of this cause.

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H. Chilton, Assistant Attorney General, for the State.
I. Defendant obtained the goods on the pretense that the name or indorsement of J. J. Carnes was his genuine signature. This case is unlike *Mathews v. State*, 33 Texas, 102, because in that case the goods were not delivered on the order, and therefore the offense of swindling was not made out.

The facts in this case did not make out a case of passing a forged instrument (art. 443), and if a prosecution had been begun for forgery or passing a forged instrument, it would probably have failed for want of an intent to injure or defraud. This intent is necessary in forgery. Art. 431, Penal Code. But is not specifically necessary in swindling,—that is, not in all cases. *Bridgers v. State*, 8 Texas Ct. App. 145; art. 793, Penal Code.

Now, from the facts proven in this case it will be seen that the teller of the bank was not in fact defrauded of one cent,—was not injured pecuniarily,—and yet it is clear that the money was obtained on a pretense known to be false by the defendant. Art. 794, Penal Code, does not mean to make swindling subordinate to other offenses, but was merely intended to show that the definition of swindling was not exclusive of prosecutions maintainable on the same facts for other offenses. The effect of that article is to make facts which are punishable as swindling and punishable as some other offense, subject to prosecution for either offense, but not for both.

II. The money was not acquired on the faith of the drawee, *Hirshfield's* name; and whether he paid the draft or not, the name of Carnes being the instrumentality or pretense by which the money was obtained, the offense was complete.

HURT, J. The defendant was convicted of the offense of swindling. The indictment charges that defendant did “present, exhibit and deliver to one Paschal Tucker,

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a certain instrument in writing commonly called a check, which said check was drawn and signed by said H. Hirshfield on one H. M. Hirshfield, at Eastland, Texas, for the sum of twenty-five dollars, in favor of him, the said H. Hirshfield, and the name of the said H. Hirshfield was written and indorsed on the back of the said check. That on the back of said check was written and indorsed the name of one J. J. Carnes; the said name purporting to be the genuine signature and indorsement of said J. J. Carnes, on the back of said check; that said check was in substance as follows: \$25.00. Dallas, Texas, Sept. 24, 1880. At sight pay to the order of myself twenty-five dollars, value received, and charge the same to account of (signed) H. Hirshfield. To H. M. Hirshfield, Eastland, Texas; and that said check cannot be set out in exact words and figures, because said check cannot be obtained by this grand jury, and the indorsements and names written and indorsed on said check were as follows, to wit: H. Hirshfield, J. J. Carnes; and the said Hirshfield did then and there represent and pretend to the said Paschal Tucker, that the signature and indorsements of said J. J. Carnes, on the back of said check, was genuine, and was the act and deed of said Carnes; and the said check and said signature was then and there presented, exhibited and delivered by said H. Hirshfield to said Paschal Tucker as the genuine act, signature and indorsement of J. J. Carnes. But in fact the said name, signature and indorsement of J. J. Carnes on the said check was not genuine, and not the act and deed of said J. J. Carnes or of any one authorized by said Carnes to make the same, but was then and there *false* and *forged*, without the knowledge and consent of said Carnes. That said check was worthless without the genuine signature and indorsement of said J. J. Carnes. That said H. Hirshfield then and there *well knew* that said signature and indorsement of said J. J. Carnes on the back of said check was not the act

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and deed of said J. J. Carnes, or of any one authorized by him to make the same, and said Hirshfield then and there well knew that the signature of said Carnes was a forgery, made without the knowledge and consent of said Carnes. That by means of the false and fraudulent acts, pretenses and devices and representations of said Hirshfield as above set forth, he the said Hirshfield did then and there fraudulently and feloniously receive and acquire from the said Paschal Tucker the sum of twenty-five dollars in paper money of the United States,"— and so on, setting forth the other facts constituting the offense of swindling.

This indictment, beyond any question, charges as the means by which the money was acquired by the defendant all of the elements entering into and constituting the offense of uttering a forged instrument knowing the same to have been forged, as defined in art. 443, Penal Code. The said article reads as follows: "If any person shall knowingly pass as true, or attempt to pass as true, any such instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

The defendant is simply charged in the indictment with passing as true a forged instrument knowing it to be forged. This being the case, the defendant excepted to the indictment:

"1st. Because said indictment sets out an offense known to the law other than swindling, and defendant says he cannot be prosecuted for swindling herein.

"2d. Said indictment sets out an offense known to the law, to wit: passing a forged instrument, and defendant says he cannot be prosecuted for swindling herein."

These exceptions were overruled by the court; to which the defendant excepted. Did the court err in overruling these exceptions?

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Counsel for appellant, in their brief, and in a very able argument before this court, insist that this was error, and claim that the judgment of the court below should be reversed because of the same. In support of this position counsel cite art. 794, Penal Code, which provides that, "When property, money, or other articles of value enumerated in the definition of swindling are obtained in such manner as to come within the meaning of theft, or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines such other offense." The indictment as well as the facts clearly show that the money in this case was obtained in such manner as to come within the meaning of the offense defined in art. 443, Penal Code, to wit, knowingly passing a forged instrument as true. If, then, a conviction under this indictment and upon the facts in this case would have the effect to take the case out of the operation of art. 443, which defines another offense, the court below should have sustained the exceptions. For, if the law in defining some other offense embraces the offense charged in this indictment, that law must be given full force and effect, and the case be tried and defendant convicted, if guilty, thereunder.

We are thus brought to the controlling question in this case, which is: Will a conviction under this indictment of the offense of swindling have the effect to take the case out of the operation of art. 443? Let us suppose that defendant is being prosecuted under an indictment for knowingly passing as true this very instrument to the same party and at the same time, it being the same transaction. He, having been convicted of swindling by uttering this instrument in that transaction, pleads this conviction to the indictment for *uttering* the instrument. Would this be a good defense to the indictment for passing the instrument? If so, the conviction for swindling

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would defeat the operation of art. 443, and thereby take the case out of the operation of the law defining another offense. This must not be done.

But to the proposition. Is the defense, to wit, former conviction of the swindling, a legal one to the indictment for uttering this forged instrument? By section 14, Constitution of this State, it is provided that "no person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." Under the Constitution, no person shall be twice put in jeopardy for the same offense. What is meant by the term "same offense?" Does it mean the same offense *eo nomine*? or the same act or acts? Let us consult our Code. From it we learn that an offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed by this Code. "An act forbidden," etc. From this we are not to infer that a single act in every case constitutes an offense. In a great many offenses several acts are necessary to constitute an offense. These, however, under this definition are considered the act which is forbidden or punished by law. To these acts or omissions the Code, in most of the cases, has given names. This, however, is conventional. To the act constituting larceny under the common law, the Code gives the name of theft. But back to the proposition!

The Constitution prohibits placing a citizen twice in jeopardy for the same offense. Is the name given to the act or acts which constitutes the offense to control when we are seeking to determine whether it be the same offense or not, or must we not look to the act or acts, or the omissions prohibited and punished by the Code, in order to determine this question? We must, in determining whether they are the same offense or not, look to the act, acts or omissions; for these and not the name by

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which they are called are denounced by the Code. We therefore conclude that a person shall not be twice put in jeopardy for the same act, acts, or omission, which are forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code. A conviction, therefore, for swindling which rests upon and is supported alone by the act of passing as true the instrument set forth in this indictment is a full and complete satisfaction of the law which forbids, and upon conviction prescribes, a punishment for said act.

The act of knowingly passing as true a forged instrument is denounced by positive law, with a punishment annexed which is prescribed by this Code. This act, as was foreseen by our law makers, enters into and constitutes the vital elements of, at least, two offenses, to wit, swindling and knowingly uttering a forged instrument as true. The act, however, being the offense, and not the name, a conviction for this act would be a complete satisfaction of the violated law. But we are met just here with the proposition that, as the defendant could not have been convicted under the indictment for swindling of the offense of knowingly passing as true a forged instrument, therefore he cannot plead this conviction for swindling to a prosecution for uttering a forged instrument. We are aware that in *Thomas v. State*, 40 Texas, 36, and the text books generally, this proposition is stated, and as a general proposition we think it is correct. But it must be borne in mind that there is another principle applicable to this subject of jeopardy, which is quite distinct from that which obtains in pleas of former conviction or acquittal generally. This is the doctrine of carving, and is explicitly recognized and effectually applied in a number of cases by our Supreme Court and Court of Appeals. *Quitow v. State*, 1 Texas Ct. App. 47; *Wilson v. State*, 45 Texas, 76; *State v. Damon*, 2 Tyler, 387; *State v. Williams*, 10 Humph. 101; *Lumpkin v. State*, 14 Ind. 327;

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State v. Nelson, 29 Me. 329; *Ben v. State*, 22 Ala. 9; *Rex v. Benford*, Barr, 980; *Clem v. State*, 42 Ind. 420.

In *Quitow v. State*, the defendant was charged and being prosecuted for the theft of a saddle and bridle. To this indictment he interposed a plea of conviction of theft of a gelding, and that the theft of the bridle and saddle was the same transaction,—the same act. The Court of Appeals properly held that this plea constituted a good and lawful defense to the indictment for theft of the bridle and saddle. The rule, therefore, to plead successfully a former conviction to an indictment, that under the allegations of the first indictment he could have legally been convicted of the offense charged in the second is not sound, but, on the contrary, is in direct conflict, not only with the authorities above cited, but with the text books in which we find the proposition enunciated. Who will affirm that under an indictment for theft of a gelding a party can be legally convicted of the theft of a saddle and bridle, these not being named in the indictment? Yet, if the theft of all these was but one transaction, a conviction for one is a full and complete atonement for all. The state having carved once will not be permitted to carve farther. She will not be permitted to split or divide up this act or transaction into divers parts, and punish each moiety.

We will not discuss the very perplexing question which arises in a case where the first indictment covered a part only of the acts or grounds which are occupied by the allegations of the second; for a conviction of the swindling in *this case* required every act, and utilized the whole ground which is covered by the offense of uttering a forged instrument. The knowledge, intent and acts which constitute uttering a forged instrument were not only the necessary means *in this case*, but were actually applied to obtain the conviction of swindling. This being the case, the conviction for swindling could be interposed

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to a prosecution for uttering the forged instrument, and if this can be done the effect would be to take the case out of the operation of art. 443, which defines another offense, thus accomplishing the very ends expressly forbidden by art. 773 of the Penal Code.

It is urged with great plausibility by the able assistant attorney general that the provisions of art. 773 can only be invoked in such a case as the following, to wit: when the prosecution is for uttering the forged instrument or some other offense, the evidence bringing the case within the definition of swindling, and the defendant *relies* upon the fact that the act or acts constitute swindling to *defeat the prosecution for uttering the forged instrument*, or the other offense.

Let us examine the position. It assumes that if it were not for the provisions of art. 773 such a defense might be made. Strike from the Code art. 773 altogether, will the defendant have the right to this defense? By no means. The same act or acts constituting the two offenses, if the defendant is convicted of one and is being prosecuted for the other he will be thrown upon his plea of former conviction. And if in truth it be the same act or transaction, though the offense be of different names, by virtue of the doctrine of carving his plea would be good. Art. 773 was not necessary to prevent this defense, and if that be its only purpose it is a work of supererogation. Again, concede this to be *one* purpose of said act, it is too restricted. We are not to permit the law of swindling to take the case out of the operation of the law which defines theft or any other offense. This must not be done by any procedure; hence if a conviction for swindling has this effect it (this conviction) comes within the prohibition of art. 773, and is therefore unlawful. In support of this construction of this article we refer to *Cline v. State*, 43 Texas, 494. While it is true that a construction of said article was not absolutely required

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to determine that case, yet, coming as it did, naturally in the line of the argument of the judge who wrote the opinion, we believe the construction of said article in that case to be the matured and deliberate opinion of the court. Judge Moore, in discussing the distinction between theft and swindling, after citing the article of the Code which defines swindling, says: "And as this definition seems to be quite broad enough to include some phases of the offense of theft, and possibly some other offenses, to *avoid as far as possible any embarrassment in determining the particular offense for which the criminal should be held to answer* if the facts bring the case within the definition of swindling as well as theft or some other offense, it is further provided by art. 773e 'when property, money or other articles of value enumerated in the definition of swindling are obtained in such manner as to come within the meaning of theft or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take such case out of the operation of the law which defines such offense.'" The italics are ours. If the purpose of said article is not that asserted by the Supreme Court in the above case, we are unable to assign any object whatever, for we have shown that it was absolutely unnecessary for any other purpose.

We therefore conclude, 1st, that under the Constitution in regard to jeopardy "no person shall be twice put in jeopardy for the same act or omission, whether the offense be the same *eo nomine* or not. 2d. That a conviction of the swindling in this case can be pleaded in bar to a prosecution for uttering a forged instrument. 3d. And that this conviction (being a good bar to a prosecution for uttering the forged instrument) has the effect to take the case out of the operation of the law defining another offense, and is therefore illegal.

If we are right in the above conclusions it follows that

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the court erred in overruling defendant's exceptions to the indictment.

For which error, the judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

JOE GARROLD v. THE STATE.

NEW TRIAL — CONTINUANCE — EVIDENCE. — In a trial for horse-theft the only material evidence inculpatory of the defendant was that of one S., which was contradicted in some particulars by his own testimony at the examining trial, and which, moreover, showed knowledge if not complicity on his part, and a motive to convict the defendant. Defendant had been refused a continuance asked for the purpose of procuring certain *alibi* testimony commensurate with and contradictory of the evidence of S. *Held*, that on this state of case the defendant's motion for a new trial should have been granted.

APPEAL from the District Court of Dimmitt. Tried below before the Hon. D. P. MARR.

The indictment charged that the appellant, on March 1, 1881, did fraudulently and feloniously steal, take and carry away from the possession of S. V. W. Jones and E. H. Carll, constituting the firm of Jones & Carll, three certain horses, the property of said firm, without the consent of them or either of them. The appellant was found guilty, and a term of seven years in the penitentiary was assessed as his punishment.

R. H. Pane, for the State, testified that he was the foreman of Jones & Carll at their sheep-ranche in Dimmitt county. The horses in question were taken from their accustomed range near the ranche. The witness proved the ownership and description of the horses, but stated no circumstance tending to connect appellant with them

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other than the fact that he was in the neighborhood several times before they disappeared, and was not seen there by the witness after they disappeared.

S. V. W. Jones, one of the owners, testified that neither he nor his partner gave consent to the taking of the horses, but agreed to give Sprinkles, the principal witness for the State, ten dollars to recover them.

James Sprinkles, for the State, testified that, about the day alleged in the indictment, he and Bob Wood, George McCarty, and the appellant were at Wood's place on the Pendencia, in Dimmitt county. Appellant, talking to the others, said he intended to take that night three of Jones & Carll's horses they had that day seen on the prairie near Jones & Carll's ranche in Dimmitt county. Witness supposed that the appellant knew the horses to be the property of Jones & Carll, as well as witness himself did. Mr. Carll offered witness ten dollars to get the horses back, and the next time witness saw the appellant he had a talk with him and told him that he, witness, wanted the horses; but the appellant refused to give them up, and said he would kill them first and cut out the brands on them. This was at Dick Horn's ranche on the Sabinal, where witness had stopped on his way to attend the District Court of Medina county at Castroville. The horses were then near Horn's ranche. Witness did not get them because the appellant would not give them up, and said he had bought them from Bob Wood.

On his cross-examination Sprinkles could not say whether he was going to or returning from Castroville when he had this talk with the appellant at Horn's, nor whether it occurred on the first or a second trip he made to Castroville to attend the court there. Subsequently the witness was arrested, and some time afterwards Sergeant McKinney of the Rangers proposed to him to give testimony in this case and others, "and told me," said the witness, "if I would do so they would see me through,

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and I agreed with him to give the boys away if they would do it. I do not know if there are any indictments against me; I have not been in arrest since. When I made the agreement with Sergeant McKinney of the Rangers, I was under arrest by the Rangers. They agreed to see me through if I would give the boys away, and when I testified before the examining court told me I could go." The witness thought that his arrest was on the charge of stealing Ed. English's cows. He did not tell either Jones or Carll about his talk with appellant at Horn's, nor tell it until he made the agreement with the Rangers to give the boys away, because he was afraid he would be killed. The first time he told about the previous conversation at Wood's ranche was at the examining trial in this case. No one else was present when he and appellant had the talk at Horn's. At Wood's, when the talk there was going on between Wood, McCarty and the appellant, witness said nothing, and did not know that the appellant took the horses.

The defense introduced the deposition of Sprinkles at the examining trial of the appellant. In a number of circumstances it was inconsistent with his testimony at the trial. Appellant had applied for a continuance to obtain the attendance of several persons by whom, he alleged, he could prove facts which would have established an *alibi* in his behalf. This application was overruled, and the ruling was relied on as one of the causes in support of the motion for a new trial.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Garrold was indicted for the theft of horse property belonging to Jones & Carll, who had a sheep ranche on the Pendencia in Dimmitt county.

One Sprinkles was the only witness who connected the

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defendant in any manner with the theft by direct and positive testimony. This witness had first given evidence in the case on the examining trial, and the testimony so given had been reduced to writing. Taking this written testimony as a guide to what the witness Sprinkles would swear on the final trial, defendant applied for a continuance on account of the absence of certain witnesses for whom he had taken out process, with diligence, after his arrest, and by whom he proposed to prove an *alibi* covering the entire time as stated by the witness at the examining trial. This application was overruled.

On the trial, in addition to the fact that the defense contradicted Sprinkles's evidence by the testimony he had given at the examining trial, in several material particulars, his trial-evidence lacks the impress of honesty and good faith, when we consider the fact, which he states, that Carll had employed him to get the horses after they were missing, and yet, after he had found them in defendant's possession, he never disclosed the information to Carll or any one else until at the examining trial; and he states his reasons for testifying then to be that, after he himself was arrested, "Sergeant McKinney of the Rangers proposed to me to give testimony in this case and others, and told me if I would do so they would see me through, and I agreed to give the boys away if they would do it."

Whether he was an accomplice or *particeps criminis* in legal parlance is immaterial in view of the attendant circumstances. His own evidence places him in such a questionable attitude as that we are not willing to sustain a conviction based solely upon his testimony, and without any evidence tending to corroborate it further than that of the witness Pane, who testified that he had seen defendant on the Pendencia several times before the horses were taken, and had not seen him after they were taken, until his arrest. In view of the evidence adduced on the

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trial, and considered in connection with the overruled application for a continuance, we are of opinion the court should have granted defendant's motion for a new trial. (Code Crim. Proc. art. 560.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

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28	130

JERRY HOLMES v. THE STATE.

1. **MURDER.—MALICE** is an essential constituent of murder either of the first or the second degree. The homicidal act must not only be unlawful, but the slayer must be actuated by malice; and whether he was so actuated involves the pivotal issue in murder trials wherein the contest is between murder on the one side and manslaughter, or justifiable, excusable, or negligent homicide on the other. Without malice there can be no murder.
2. **SAME—CHARGE OF THE COURT.**—It follows that, if the charge to the jury in a trial for murder fails to define or explain the element of malice, it fails to present the "law applicable to the case," as required by the Code.
3. **SAME—PRACTICE IN THE COURT OF APPEALS.**—If, as in the present case, the appellant was convicted of murder in the court below, and the record on appeal shows that no definition or exposition of the term malice was given in charge to the jury, this court is authorized to set aside the conviction on that account, notwithstanding the appellant failed to ask a proper instruction in the court below, but raised the question in his motion for a new trial.
4. **MANSLAUGHTER.**—See a state of proof in a trial for murder which required the law of manslaughter to be given in charge to the jury.
5. **EVIDENCE.**—In a trial for murder it was legitimate for the State to prove that the deceased, when killed, was under the influence of intoxicating liquor.

APPEAL from the District Court of Atascosa. Tried below before the Hon. G. H. NOONAN.

The indictment was presented in November, 1879, and charged that the appellant, on the 29th of the preceding January, did willfully, feloniously, and of his malice

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aforethought kill and murder one Barney Sherran. The case came to trial in May, 1881, and the trial resulted in the conviction of appellant for murder in the second degree, and an assessment of five years in the penitentiary as his punishment. A considerable number of witnesses were examined at the trial, and their testimony comprises a large part of the record. There was no controversy over the fact that Sherran, the deceased, came to his death in consequence of gun-shot wounds inflicted by the appellant about dusk in the evening of the day alleged in the indictment, and in front of a saloon kept by the appellant in the town of Pleasanton, Atascosa county.

C. J. Emsley was the first and principal witness for the State. He testified that he and the deceased were sitting on a bench upon the gallery in front of appellant's saloon, and the appellant was sitting on his door-step, in front and a little to the right of the deceased, when Dick Marshall walked up behind the deceased and in talking to him said, "Give me that pistol of yours, Barney, and let me put it away for you." Several persons were present, but at this time they all walked away, leaving the deceased, the witness, and the defendant by themselves. When Marshall asked for the pistol it was in its scabbard belted around the deceased, who then took it out of the scabbard and placed it across his lap, but with the muzzle pointed in a different direction than the defendant's position. Then the deceased looked at the defendant and said, "Jerry, you have acted the G—d d—n ——— with me." Defendant said "Barney, go off and attend to your business; I don't want to talk to you." Deceased got up from his seat, with his pistol in his hands. Witness reached for the pistol, and said "Barney, behave yourself," and at this time the deceased's pistol was discharged in a direction opposite from the defendant, the ball entering the floor of the gallery. The defendant then got up and said, as well as the witness could remem-

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ber, "I will settle this affair d—n quick," and went to the rear end of the saloon, a distance the witness supposed to be forty-five or fifty feet. While defendant was passing back in the saloon the deceased stepped off the south end of the gallery and turned north, outside the gallery, and along the street. He went about as far as the corner post at the north end of the gallery with his face turned towards the north and his left side to the saloon as he walked off. When deceased reached the north end of the gallery, the defendant was inside the front door of the saloon. Several shots were fired in rapid succession. Two shots were fired out of the saloon door from a double-barreled shot-gun, two were fired from the street, and three from the saloon besides those from the shot-gun. The deceased fired the two shots from the street. The first shots, after the accidental one before the deceased got off the gallery, were those fired out of the saloon from a double-barreled shot-gun. Deceased was shot in the left side of his back, and the ball lodging in his right side. He fired and walked a step or two before he fell and after he was shot. Witness assisted in taking care of the deceased, who died the next morning after he was shot. Defendant did not come outside of his door.

This witness Emsley appears to have been subjected to a searching cross-examination. He stated that "the killing occurred late in the evening; it was after dark or sun-down; it was night. I was sitting so I could have seen the lights in the house. It was between sun-down and dark at the time of the shooting; if twilight had not expired, it was about expiring. During the time the shooting was going on, it was between sun-down and dark or dusk of the evening. The lights might have been burning in Holmes's saloon, but I don't know whether they were or not." The witness said he did not remember what he swore at the coroner's inquest about.

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the lights in the saloon, or whether he testified that it was dark; but what he said before the coroner was correct. He was "liable to get drunk and forget many things that occur." When the shooting began, he stepped off the south end of the gallery, to get out of the way. He was close to the fence, and may have been hugging it. During the day he and the deceased took three or four drinks together at one saloon and two or three at another, but none at the defendant's. Witness supposed that the deceased, when he vilified the defendant, had his pistol in his lap. No one handled it but the deceased, and it was cocked when it fired on the gallery, but witness could not say whether or not the deceased cocked it when he laid it in his lap. When he brought it round to his lap he said "Jerry, you know I have the best of you." Witness did not see the shot-gun. He did not know that the deceased went to defendant's saloon for the purpose of raising a row, but may have heard him talk hard of the defendant at one of the saloons.

Re-examined by the State, the witness said it was light enough for him to see both the defendant and deceased distinctly. It was only supposition on his part that the first shots after the accidental one on the gallery were fired by the defendant, and also his supposition, based on their sound, that they were fired from a shot-gun. He did not see the deceased point his pistol at the defendant before the latter went into the house.

W. N. Smith, for the State, testified that about dark in the evening of the homicide he was sitting in front of his own saloon and with his back to defendant's, which was forty or fifty feet distant, when J. W. Murphey, H. W. Chapman and C. C. Campbell came from the direction of the defendant's and apprised witness that there would be a row in a few minutes. Campbell passed on some forty feet beyond witness's saloon, into which the other two and the witness entered, and just then there was a report

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which witness thought was that of a pistol. Just after that report came two others which he took to be from a shot-gun. After the firing, the witness returned to his door and saw the deceased fall.

On cross-examination the witness said that he knew it was Sherran who fell when he went to him; it was not light enough for him to identify the person from his saloon. Witness also stated on the cross-examination that he was still outside his saloon when he heard the first report, but was inside when he heard the others, though there was a very short time between them. The reports which followed the two which he thought were from a shot-gun he took to be pistol shots; there were three, four or five of them, and they sounded like they were fired outside the defendant's saloon. All the reports were very loud.

J. E. Petty, for the State, was a deputy sheriff and heard the shooting. He saw the deceased lying down, but went into the saloon of defendant and arrested him, and then returned to the street and helped to undress the deceased, whose coat he exhibited to the jury, showing in it a hole about six inches above the left hip, supposed to have been made by a bullet. The wound of the deceased, which was on the left side of his back, was probed by a doctor, who cut out a bullet as large as a six-shooter ball from its lodgment against the skin on the opposite side. The two reports next after the first one were louder than the others.

On cross-examination the witness stated that after the dressing of deceased's wound, Emsley pointed out to witness the spot where the deceased stood, saying "here is where Barney stood, and the first shot was fired from this corner;" which shot, the witness added, was in range of a shot which struck the door-facing of the defendant's saloon.

Willie O'Brien, for the State, gave a vivid sketch of his

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observations. Prior to the shooting he went to the defendant's saloon, and there saw the deceased, drunk. The defendant, speaking to the deceased who was bothering him, said "Hush! don't speak to me, d—n you;" and then the deceased replied "Don't d—n me; I have the advantage of you." Witness then knew and said to Dick Marshall that there was going to be a row, and went to Dick Marshall's store. "Then," said the witness, "I heard shots fired; I saw a blaze of fire; I don't know what they were fired from,—there was a constant blaze between the door and the post,—nor who fired them. The blaze of fire was near the door of Holmes's saloon; the blaze looked like it was between the north post of the gallery and the door, and then there was one continued blaze. It was dark, and I could not see Barney Sherran from where I stood. I can't say how many shots were fired. I do not know whether they all sounded alike or not."

On his cross-examination the witness stated that he saw the deceased put his hand to his back before the firing commenced, and heard him say "don't curse me, I have got the best of you."

W. V. L. Marshall, for the State, testified that as he passed the defendant's saloon he saw the deceased and several others there. The saloon was lighted up. Witness walked up to the deceased and laid his hand on him, and in doing so touched his pistol. Deceased gave witness a look as much as to say don't bother my pistol, and witness went off and did not bother him. Witness had long been acquainted with the deceased, and had never before seen him have a pistol, and tried to get the deceased to let him put it away for him through the day, but deceased would not do it. It was dark, and all the houses, as well as defendant's saloon, were lighted up. With this witness the State closed its evidence in chief.

C. C. Campbell, for the defense, stated that he was pres-

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ent in front of defendant's saloon when the altercation commenced between the deceased and the defendant, with an aggravating remark by the deceased. Marshall came up and appeared to be trying to get the deceased's pistol, who drew and placed it across his lap, and cocked it as he did so. Witness went away, not wanting to see the difficulty, but after passing Smith's saloon he stopped and there heard what he took to be the report of the pistol. Witness turned and looked, and through a window in the defendant's saloon saw a person whom he took to be the defendant run back into the saloon and instantly return. A shot was fired from the outside into the saloon door, towards where the defendant was standing, and then a shot was immediately fired from the inside of the saloon. Witness thought this latter shot was from a shot-gun, and it appeared from the blaze to have fired in the air at an angle of about forty-five degrees. Within ten seconds a pistol shot followed from the outside, and then from the inside came other shots, which appeared to be shot wild by some one under excitement. Witness was positive that the first shot was from the outside,—that is, the first shot after the accidental one,—and it appeared to be nearly in front but a little north of the saloon door, or about the northeast corner post. A man on the outside could have seen another inside the saloon better than the latter could have seen the former. The saloon was lighted up. Before witness left the saloon he heard the click of the deceased's pistol as he cocked it. While the shooting was going on the witness remarked "Jerry is shooting wild." The witness verified and explained a diagram of the saloon and its surroundings.

On his cross-examination by the State the witness stated that the day after the difficulty he saw in the roof of the gallery what he took to be a load of shot, which, as the context shows, he ascribed to the first shot fired by the defendant, at a rising angle of about forty-five degrees.

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Deceased did not seem angry when he laid the pistol in his lap, cocked, but immediately said, "D—n you, Jerry, I have the best of you," and then he did seem to be angry. This remark, according to the witness, was made after the defendant had told the deceased to go away and not bother him.

The defense introduced the deposition of the State's witness Emsley before the coroner's inquest. It was less definite and circumstantial than his testimony at the trial, and there are some discrepancies between the two, but, as they seem irrelevant to the rulings of this court, and as the witness himself gave the preference to his deposition at the inquest, there is no necessity to reproduce it here.

W. T. Marr, for the defense, testified that he was positive that the second shot was from a pistol and was fired into the saloon from the outside. He saw the man who fired it, and saw the flash of the pistol, and could distinguish between the report of a pistol and that of a shotgun.

J. H. Dossey, for the defense, testified that the deceased, a short time before he was killed, was at work about two miles in the country, and said that the next time he went to town he intended to have a six-shooter, and he would show Jerry Holmes that he could use it if he was an Irishman.

Cross-examined, the witness stated that he never communicated the threat to the defendant before the killing. Over objection by the defense, the witness testified that before the threat was made, the deceased had tumbled into the defendant's bed with his clothes and boots on, and defendant said he did not want any d—d man sleeping in his bed, and made the deceased get up and go out of the room, pushing him towards the door.

Mrs. Winn, for the defense, testified that she was standing in her door and saw the flash of the fire-arms

Argument for the appellant.

between the deceased and the defendant. The first two shots were fired from outside the saloon, and seemed to her to be fired into it. She was positive they were fired from the same weapon, from the sound of the reports.

G. W. M. Duck, the sheriff of the county, testifying for the defense, stated that in a conversation with the State's witness Emsley, either the night of the difficulty or the next morning, Emsley told him that the first shot was fired from behind the northeast corner post of the gallery of the defendant's saloon.

The defense having closed its evidence, the State recalled Emsley, who testified that he had no remembrance of telling Duck and Petty that the first shot was fired from the gallery post; but if he did so state he meant that the first shot fired by the deceased, after the accidental one, was fired from the post, and did not mean that that shot was the first one fired after the accidental one.

The evidence has here been much abbreviated by the omission of repetitions, explanatory statements, and collateral details. Many objections were interposed by the defense to different features of it, and also to matters of practice in the course of the trial,—which, it is obvious, was contested with vigor and ability on both sides. This cause was affirmed at the Austin term, 1881, but without a reportable opinion. A motion for rehearing was filed, and the cause transferred to Tyler.

D. P. Marr, for the appellant. The third assignment relates to the admission of evidence as to the drinking or drunkenness of deceased upon the day of the killing, over defendant's objection. It is not perceived how this testimony, in view of the other testimony upon the trial, was at all relevant or competent.

“Evidence in legal acceptance includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.”

Argument for the appellant.

“By competent evidence is meant that which the *very nature of the thing to be proved* requires as the fit and appropriate proof in the particular case.”

“Relevant, relieving, lending aid or support, pertinent or applicable, sufficient to support the cause.” (Webster.)

Relevancy — “By this term is understood the evidence which is applicable to the issue joined; it is relevant when it is applicable to the issue, and ought to be admitted; it is irrelevant when it does not apply, and it ought then to be excluded.” (Bouvier.)

Now, what was then to be proved, the issue joined? Verily, the guilt of defendant of some degree of murder. The issue was guilty or not guilty. How did the drinking of deceased on the fatal day affect the matter, or how did this fact tend to prove, or even disprove, the main fact? I am unable to say. The state of mind of deceased was not the subject of inquiry or legitimately put in issue by the prosecution. He was not charged with murder. If he had been, then it might have been both proper and important to ascertain of which degree he was guilty, and to this end evidence of drunkenness would probably have been competent. In the present case such evidence did not prove or tend to prove any fact legitimately put in issue. It was not *criteria* from which the jury could legitimately infer the guilt or innocence of defendant. It was purely (in view of the fact that defendant was a liquor dealer) a matter of aggravation, well calculated to arouse the wrath and indignation of the jury. Possibly, had the State laid a proper predicate by showing that deceased was prostrate or imbecile so that he was physically unable to fight or maintain an attack, it might then have been admissible to prove what placed him in such condition, solely, however, for the purpose of repelling the idea of self-defense; but this would have been more appropriate after defendant had closed, and by way of rebuttal, if at all. The fact that such course was not pursued by

Argument for the appellant.

the State evinces indubitably that such was not the purpose for which it was offered. *It was introduced as a matter of aggravation to arouse the indignation of the jury.* In the light, therefore, of the whole record the court committed a grave error in admitting this evidence. After the ruling of the court below, defendant attempted to break the force of it by showing that he did not sell deceased any of the liquor he may have drunk; hence some of this testimony appears to have been drawn out by defendant. I submit, however, that defendant did not and could not break or dissipate the detrimental effect of this evidence upon the jury. Possibly he may have excluded the presumption of his complicity in producing the drunkenness, but not the fact of its existence. Such testimony was not a part of the *res gestæ* as appears from the legal definition of the term. (Bouvier's Law Dic., "Res Gestæ," and 1 Greenl. Ev. sec. 108.) The admission of irrelevant testimony over proper objection is a sufficient ground for a new trial (*State v. Mickle*, 81 N. C. 552), and this court has repeatedly so held. (*Cox et al. v. State*, 8 Texas Ct. App. 304, approving *Williams v. State*, 43 Texas, 116.)

I now come to the consideration of the supposed errors of omission and commission in the charge given by the court. In the motion for a new trial the attention of the lower court was directly called to the errors in the charge. That in a felony it is the duty of the court to charge all the law applicable to the case and every phase thereof under the evidence, whether requested or not, and if the error or omission is fundamental, material or essential to a proper understanding of the offense charged, or is calculated to injure or prejudice any of the rights of the accused, judgment will be reversed, whether the charge was excepted to or not, is no longer an open question. (*Henry v. State*, 9 Texas Ct. App. 358, approving, among others, *Bishop v. State*, 43 Texas, 390; see also Revised Statutes, art. 1318.)

Argument for the appellant.

1. There was no definition of malice at all. Neither its legal meaning or import in common parlance was given, nor was the distinction between the two drawn. Malice is the most essential ingredient in the crime of murder. Without it there can be no murder of either degree. It distinguishes that offense from every other species of culpable homicide. Unless it was explained to the jury they could not understand its legal meaning, or the offense for which they were trying the accused, nor the right of self-defense. Its definition, therefore, was material and important to defendant, and he had a plain statutory right to have the term fully explained to the jury. Possibly had the court defined the term as understood in common parlance, as was done in the case of *Harris v. State*, 8 Texas Ct. App. 90, the appellant might not be heard to complain of the omission. But the present case is plainly distinguishable from the *Harris* case. There the charge of the court contains a full and explicit definition of the term malice, though possibly it limits the meaning to "hatred," "ill will" or "hostility," and this court held such definition was not to the prejudice of the accused. Here, however, there is no definition of the term at all. Surely, therefore, in view of the premises, when this total omission is considered, this court cannot hold that the charge in question contains all the law applicable to the case. (Code Crim. Proc. art. 677.) But I regard the law on this point affirmatively settled by the repeated decisions of this court, even in less important cases than the present. 3 Texas Ct. App. 472; *Id.* 318; *Smith v. State*, 1 Texas Ct. App. 516; *Anderson v. State*, 1 Texas Ct. App. 730; 1 Texas Ct. App. 397.

"Malice," says Bouvier, "is a wicked intention to do an injury," and this intention is not confined to the persons injured. It may be directed to some one else or against mankind in general. But I find this term explained to my satisfaction in the opinion delivered by Mr.

Argument for the appellant.

Justice Clarke in *Harris v. State*, *supra*, wherein it is said: "Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken."

2. In view of the facts developed in evidence, it was the duty of the court below to have charged the law of manslaughter to the jury, and the omission to do so, having thereby excluded this issue from the jury, is an error sufficiently prejudicial to appellant to require a reversal of the judgment. This court, as well as the Supreme Court, has uniformly held that where there is any evidence, however slight, tending to justify the act or reduce or ameliorate the grade of the offense, the accused is entitled to the benefits of it under appropriate instructions from the trial court, submitting the question to the determination of the jury. *Richardson v. State*, 9 Texas Ct. App. 612; *Id.* 95; *Wasson v. State*, 3 Texas Ct. App. 474, and authorities cited; 38 Texas, 485; 7 Texas Ct. App. 414.

Was there any such evidence from which the jury might probably have inferred in the case at bar that the killing was done "under the immediate influence of sudden passion arising from an adequate cause?" I answer that there was not only such evidence, but abundantly sufficient evidence. To verify this let the statement of facts be examined, and particularly the testimony of State's witness Emsley and defendant's witness Campbell. From this testimony in particular I deduce the following conclusions of fact as bearing upon the point under investigation: First, just prior to the fatal shot, deceased had attempted to make or had made a violent and unlawful attack upon the appellant; had cursed appellant, drawn his pistol, and told appellant that he (deceased) had the best or advantage of defendant. Second, at this time, while deceased was in the dark or shadow of the roof of the saloon gallery, and defendant in the

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light, sitting in his door, deceased either shot off his pistol in an attempt to kill defendant or it was accidentally discharged in the scuffle with Emsley, who it seems was trying to wrest the weapon from deceased and stop his attack. Third, that defendant thereupon (when under great *disadvantage as to weapons, light and position*) rushed hastily into the saloon. Fourth, that he returned in a very short time (armed in all probability), Campbell swearing "almost instantly," and no witness fixed the time at longer than 10 or 15 seconds. Fifth, that upon such return firing between the parties was immediately renewed and continued upon both sides until deceased was killed by the seventh or eighth shot; but the evidence is conflicting, and there is a grave and reasonable doubt as to who fired the first shot after the difficulty was renewed or continued, with strong probabilities, however, that deceased renewed the attack upon defendant's return to the doorway. Sixth, defendant was enraged and excited, and justly so under the circumstances; and, as the witness Campbell testified, "shot wild."

In view, therefore, of the premises I submit that the law of manslaughter should have been given to the jury. The learned judge who presided below was evidently of the opinion that the "adequate causes" enumerated in the Code are exclusive. Unquestionably he was in error. The rule *expressio unius, exclusio alterius est* has no application to this subject. *Reed v. State*, 9 Texas Ct. App. 317; 2 Texas Ct. App. 476; 38 Texas, 485.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of murder in the second degree. "Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty

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of murder." To constitute this offense without regard to degrees, the killing must not only be unlawful, but the slayer must be incited to kill by *malice*. Malice is, therefore, an essential element, and must prompt the slayer to the act of killing in every case, whether of the first or second degree.

Is a charge which fails,—in fact, does not attempt,—to define or explain malice such an one as is required by the law? This explanation or definition being omitted, does the charge present the law applicable to the case? It being absolutely a necessary ingredient of this offense, a clear understanding of the term "malice," by the jury, was of vital importance to the proper decision of the main question, to wit: was the defendant guilty of murder? Its existence forms the pivotal point in all murder trials in which the contest is between murder on the one side and manslaughter, justifiable, negligent or excusable homicide on the other. Without it there can be no murder. We are of the opinion, therefore, that a charge which fails to explain this element does not present the law applicable to the case. This defect in the charge was pointedly called to the attention of the court by the motion for a new trial herein. *Bishop v. State*, 43 Texas, 390.

We are authorized to revise the action of the court below, though a proper charge was not requested at the time by the defendant. These authorities, we think, place at rest the question above presented: *Hodges v. State*, 3 Texas Ct. App. 470; *Anderson v. State*, 1 Texas Ct. App. 730; *Smith v. State*, 1 Texas Ct. App. 517; *Williams et al. v. State*, 3 Texas Ct. App. 316.

We are also of the opinion that the case as made by the facts is such as required a charge upon manslaughter. (The Reporter will give the evidence.)

The State, we think, clearly had the right to prove that deceased was under the influence of whisky. The other errors complained of by the attorney for defendant will

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not likely arise again upon another trial. The motion for rehearing is granted, and upon the merits the judgment, for the reasons stated above, is reversed and the cause remanded.

Reversed and remanded.

BEN HINDS v. THE STATE.

1. THEFT — EVIDENCE. — The prosecuting witness testified that the defendant told him that he "did not know, but believed that P. and C. took the animal off," and that, acting upon such information, he followed to V. county, arrested P. and recovered the stolen animal. The defendant offered to prove by the witness that he, defendant, loaned him the animal ridden in pursuit. *Held*, that the court erred in sustaining the State's objection to the evidence proposed.
2. SAME. — The State having introduced a confessed thief and an accomplice in the offense for which the defendant was on trial, the defense proposed to prove by him that he was indicted for the same offense, and, by agreement with the county attorney to dismiss the prosecution as to him, had turned State's evidence. *Held*, that such proof was competent, and its exclusion was error.
3. SAME. — E., a State's witness, testified that shortly after another certain animal was stolen, the defendant told him that he knew where some stray horses were running, and proposed to get them up and deliver them to the witness to sell, the two to divide the proceeds. The defendant proposed to prove by one W. that he, W., inquired of defendant if he knew anything of the missing animal, and that the defendant replied that he believed E. knew something of it, and that he would make a proposal to E. and get his confidence, and find out if he had such knowledge; and further, that he subsequently told W. he had made the proposal to E. but was satisfied that E. knew nothing of the horse. *Held*, first, that the defendant's objection to the evidence of E. should have been sustained, and, second, that the State being permitted to make such proof, the defendant was entitled to the evidence of W. as proposed.
4. SAME. — Evidence of a conspiracy between the defendant and others to engage generally in an enterprise of indiscriminate horse-theft, and which has a strong tendency to connect the defendant with the theft of the specific horse charged in the indictment, is admissible. The conspiracy being shown to have for its purpose the commission of offenses of a certain character, but no specific offense,

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the acts, declarations and conduct of each of the conspirators, if a specific offense is committed in furtherance of the general design of the conspiracy, are evidence against each, whether or not the conspirator on trial participated in, agreed to or advised the commission of the specific offense on trial. See the opinion for the rule discussed.

5. SAME.— See the opinion for evidence held insufficient to corroborate the testimony of an accomplice.

APPEAL from the District Court of Llano. Tried below before the Hon. A. O. COOLEY.

The indictment charged the defendant and others with the theft of a horse, the property of one O'Banion. The trial of this appellant resulted in a verdict of guilty, with five years in the penitentiary assessed as punishment.

J. B. O'Banion for the State testified that he owned a paint horse, in Llano county, in August, 1880. The animal was about 15½ or 16 hands high, had a white spot on the left side of the neck extending from the head to the shoulder, a white spot on the left side, some white on the left side, left flank, under the belly and on the legs; also a white spot on the right side, and another on the right side of the neck, which, being covered by the mane, was not readily noticeable. He was branded L E on the left hip, and ranged below the town of Llano, down towards Lone Grove in Llano county. The witness missed his horse in August, 1880, and hunted him all over Llano county until satisfied that he had been stolen. He received information which caused him to go to Van Zandt county in search of the animal, where he recovered it in November, 1880. *En route* to Van Zandt county, the witness met Henry C. Paschal and Christian Clark. He arrested the former and lodged him in the Burnett county jail. Shortly before the October term, 1880, of the District Court, the defendant told the witness that, though he, defendant, did not know it as a certainty, he believed that

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Henry C. Paschal and Christian Clark took the horse with them when they went to Van Zandt county to pick cotton.

The defense proposed to prove, on cross-examination, by the witness that the defendant loaned the witness a horse to ride to Van Zandt county, but upon objection by the State the evidence was excluded. The defense then asked the witness whose horse he rode to Van Zandt county in quest of his stolen horse, but the State's objection thereto was sustained. The witness stated that he did not, at any time, tell Paschal who had, or that any one had, notified him that he, Paschal, had taken the horse.

Henry C. Paschal, the principal witness for the prosecution, was next put upon the stand. He testified that he knew the defendant, and William Hinds, John Hughes, Henry Hughes, Christian Clark, Warren Jeffries, Jim Coggins and John Harridge, and knew them on or about August 25, 1880, and for about two months prior to that time. He knew the O'Banion paint horse. Himself and Christian Clark took the said horse to Van Zandt county and traded him for a mare, receiving five dollars as boot. The witness and William Hinds, defendant's son, caught the O'Banion horse near McNutt's farm, on the range in Llano county, about noon or a little later, and tied him on the mountain near the Hatley store. That night the defendant and his son, William Hinds, brought the horse and delivered him to witness and Christian Clark at the Burnett crossing of the Colorado river, about one and a half miles below Bluffton, from whence the witness and Clark took him to Van Zandt county, passing through Burnett and Liberty Hill *en route*. On their way to Van Zandt county with the horse they overtook R. S. Bell, James Burkett and William McAdams. This all occurred in August, 1880. In November, 1880, the witness met O'Banion on his way to Van Zandt county, looking

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for his horse, and was by him arrested and placed in the Burnett county jail.

For two months before the witness and Clark took the O'Banion horse to Van Zandt county, himself, the defendant, Wm. Hinds, John and Henry Hughes, Clark, Coggins, Harridge and Jeffries were frequently together at Murray's store at Lone Grove. At times all the parties named would be together, and at other times only some of them. From the store they were in habit of going to the woods to play cards, remaining in the woods sometimes for three consecutive days. Over objection of the defendant, this witness was permitted to testify that there was an agreement between himself and the parties named to steal and run off horses and sell them; that the defendant was present sometimes when this enterprise was discussed by the parties to it, and that he, the witness, understood that the defendant was a party to it. The witness was permitted, also, to testify, over objection by defendant, to conversations between the witness and the other parties, in the absence of the defendant, concerning the stealing and sale of horses, and to the theft by himself and others of the party of a number of horses at different times, without showing that the defendant knew of or was concerned in such thefts.

According to the understanding of the witness there was a common agreement between the witness, defendant and the other parties named, to steal horses, sell them and divide the proceeds. In pursuance of this agreement, the witness and Christian Clark drove off the George Trent horse and sold it in Lampasas. On their return they told Coggins, Harridge and Henry Hughes where they sold the Trent horse. These parties said that it had been sold too near home, and went to Lampasas and "proved" the horse away from the purchaser, and took it off. In pursuance of the same agreement, Jeffries and John Hughes stole the Pritchard horse, and the wit-

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ness a big bay horse and several "strays." The witness assisted the defendant pen some horses at Pecan Grove, branded 87, which defendant said were strays, and that he was going to take them up about or towards Fredericksburg and sell them. Witness has never seen the horses since.

On cross-examination this witness stated that if the defendant knew anything about the theft of any horses by the party, other than that of the O'Banion horse, he, the witness, did not know it, but as he, defendant, talked about other thefts of horses, the witness supposed he did know. The agreement to engage in horse stealing was entered into between witness, John and Henry Hughes, Coggins, Harridge and Clark. The witness did not know when the defendant first became a party to it, or where he first canvassed the enterprise with him and others, or who was present. The defendant at no time spoke to the witness of taking any particular horse or horses save the O'Banion horse and the estrays in the 87 brand. If he, defendant, knew of any of the other thefts mentioned, the witness was not apprised of the fact.

When this witness was first introduced the defense challenged his competency to testify upon the ground that he had been indicted for the same offense (which the State admitted), which indictment had not been dismissed; and the objection was overruled. At another stage of his examination the defense proposed to prove by him that he had turned State's evidence under an agreement with the county attorney to dismiss the prosecution against him for the same offense. The State objected and the evidence was excluded. The defense objected throughout the entire examination of this witness, to all evidence relating to the theft of any horse or horses other than the O'Banion horse mentioned in the indictment; but the objections were overruled.

R. S. Ross testified for the State that in August, 1880,

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himself, James Burkett and William McAdams left their homes near Lone Grove in Llano county, and went below to pick cotton. The day they left, they met Christian Clark, about a mile and a half from Burn's store, traveling from towards Bluffton, and going towards Lone Grove. The parties took dinner together that day. On the second day thereafter, Henry C. Paschal and Clark overtook the witness and his companions in Williamson county. Paschal was riding a paint horse, which he then recognized as a horse once owned by Russell, but which he has since learned was then owned by O'Banion, and was leading a bay pony. The testimony of James Burkett and Wm. McAdams was substantially the same as that of Ross.

A. A. Murray testified that defendant, Wm. Hinds, Paschal, Clark, John and Henry Hughes, Coggins, Harridge and Jeffries were frequently at his store during the two months before the O'Banion horse was missed, but he did not know that all of them were together at any one time. When they met at the store they generally went off into the woods together, as the witness understood from their conversation, to play cards. The witness did not know where Wm. Hinds, John and Henry Hughes, Harridge, Clark or Coggins were at the time of this trial. They left during the winter. Jeffries was then in the Llano county jail. This witness was permitted to state, over objection of defendant, that some campers claimed to have lost some horses about the time the O'Banion horse disappeared.

Wm. Yett testified that he knew defendant in August, 1880. On a Friday, between the 20th and 25th of August, while the witness was at Hatley's store, the young man called Wm. Hinds galloped by, leading a dark bay paint horse. The horse had a white spot on its neck, running the whole length from the head to the shoulder, a white spot on its side, and some white on its flank and under its belly. Within a minute or two the defendant

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galloped up to the store, and either asked if anyone had passed, or if his son had passed, and presently followed in the same direction in a gallop. These parties went down the Burnett road, towards the Burnett crossing of the Colorado.

Cross-examined, the witness said that it was about fourteen miles from Hatley's store to the Burnett crossing of the Colorado. The witness knew the paint horse owned by the defendant, and had seen it several times, but did not know that he had ever seen it before he saw the paint horse led by Wm. Hinds on the occasion referred to. The defendant's was a light bay paint, medium sized, cow pony.

Harry Estes, over the objection of the defendant, testified that in August, 1880, the defendant told him that he knew of some stray horses down about Flat Rock; that he would get them up and turn them over to witness, if witness would take them off and sell them, the two to divide the proceeds. The witness replied that he was not too good to steal, but was too much of a coward.

On his cross-examination, this witness testified that this proposition was made to him by the defendant shortly after the Trent horse was missed. After the witness had declined, the defendant asked him if he knew anything of the Trent horse. The witness believed then that the defendant was laying a trap for him, to find out whether or not the witness would steal. At this juncture the defendant proposed to prove by the witness that, a short time after the proposal, the witness told Williamson of it, and that Williamson told the witness that he, Williamson, knew before the proposition was made, that the defendant was going to make it to the witness, in order to find out whether or not the witness knew anything about the disappearance of the Trent horse. The State objected, and the defense was not permitted to make the proof.

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W. E. Hatley testified for the defense that he was present at his store on the occasion testified to by Wm. Yett, when Wm. Hinds, followed by the defendant, passed, leading a paint horse. The witness knew that the defendant owned a paint horse at the time. He had often seen the defendant and Wm. Hinds riding it, and had often seen it tied at the store. The witness had never paid enough attention to the defendant's paint horse to be able to give an accurate description of it. Wm. Hinds led the horse down the public road, towards Murray's store, which is three-fourths of a mile distant from the witness's store.

A. A. Murray testified for the defense that about the 15th of August, 1880 (he could not state accurately the day of the week or month), the defendant and Wm. Hinds came to his store, the latter leading a paint horse. They stopped at the well and watered their horses. The witness knew that defendant owned a paint horse at that time, and took the horse which Wm. Hinds was leading to be the one owned by defendant. When they left the well they turned off the Burnett road, and went towards James Williamson's house; in going to which, they would have to pass two or three houses.

James Williamson, for the defense, testified that sometime in August, 1880, the defendant and Wm. Hinds came to his house, and remained over night. Wm. Hinds was leading a paint horse that belonged to the defendant. The witness knew the horse well, and knew that it was the paint horse which the defendant owned. The defendant's paint horse was a good-sized cow pony, worth forty dollars—a common bay paint, with white on the sides and neck, and on the legs and belly. The opinion sets out other evidence proposed to be made by this witness, but which was excluded by the court below.

The evidence of Paschal for the prosecution timed the delivery of the stolen animal to him by defendant and

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Wm. Hinds, at the Burnett crossing, on either the Thursday or Friday night before the Saturday morning on which a certain horse race was run on Wright's Creek, twenty miles distant from the Burnett crossing. Several witnesses testified for the defense that the defendant and Wm. Hinds were at the race course, or *en route* to it, from one o'clock P. M. on Friday, until noon on Saturday, after the race had been run — that they camped on the race track on Friday night, and remained there throughout the night.

Julius Oatman and *W. W. Martin*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of theft of a horse. The State, by the owner, J. B. O'Banion, proved that the defendant told him, the witness, that he (defendant) thought he, witness, would find his horse in Van Zandt county; that he, defendant, did not know "but that he believed that Henry C. Paschal and Christian Clark carried his horse off, when they went below to pick cotton." O'Banion in pursuance of this information went to Van Zandt county, arrested Paschal and found his horse. The defendant proposed to prove by the witness O'Banion that he loaned him his horse to ride to Van Zandt county in pursuit of the thieves and his horse. The district attorney objected to this evidence and the court sustained the objection; to which the defendant excepted.

This proof could have been adduced for no other purpose than to show a guilty knowledge on the part of the defendant, and in this manner prove his participation in the theft of the horse. If the above fact, under the circumstances of this case, could have this effect, certainly all attending facts and circumstances connected with this matter are admissible.

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There is no evidence to prove that either Paschal, Clark or the defendant was suspected of complicity in the theft. This being the case, we cannot conceive how it is possible to torture the conduct of the defendant in this matter into an inculpatory fact. A.'s neighbor's horse is stolen; he goes to him and informs him that he does not know but believes that P. and C. have taken and carried him to another county. A. may know or be informed of facts tending to induce this belief, and be perfectly innocent of any connection with the theft. To hold otherwise would, to our minds, be monstrous. Such doctrine would jeopardize the liberty and reputation of any person who has knowledge, either personal or from others, of facts showing the commission of crimes. And if to disclose his opinion, and thereby lead the owner to catch the thief and reclaim his property, is to be construed into evidence against the informer, the punishment of criminals would not only be rare, but very dangerous to others besides the thief. However, if such conduct, which appears to us consistent with and worthy of a good citizen, is to be viewed in a criminal light, every fact and circumstance connected with and calculated to explain or negative this illogical view, are evidently admissible.

One Henry C. Paschal, a confessed thief, and an accomplice in this case, was introduced by the State. This witness swore to facts which, if true, fixed guilt upon defendant beyond any sort of question. Defendant proposed to prove by this witness "that there was an agreement between him and the district attorney that he, the district attorney, would dismiss the prosecution against him for the theft of the horse mentioned in the indictment in this cause, provided the witness would turn State's witness herein." To this the district attorney objected; which objection was sustained by the court, and defendant excepted. We must assume that defendant could have proven the facts offered; and that being the

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case, let us re-state the proposition. A. is on trial for theft; P. is a very important witness against him; he is not only an avowed thief and an accomplice, but A. proposes to prove that he is indicted for the same theft, and that there is an agreement between him and the district attorney to dismiss the prosecution against him if he will become a witness against A. Had A. the right to make this proof? Beyond all controversy he had. This question is beyond the range of discussion. If an authority could be found holding otherwise, it would be opposed to the plain principles of justice.

The State proved by one Estes that "defendant told the witness that he knew of some stray horses down on Flat Rock, and that he, defendant, would get them up and turn them over to me, witness, if I would take them off and sell them, and that we would divide." This proposition was made to the witness a short time after the George Trent horse had been stolen. The defendant proposed to prove by one James Williamson, that he, Williamson, made inquiry of defendant about the George Trent horse, that was alleged to have been stolen, and that, at the time he made the inquiry and a short time before defendant made the proposals to the witness Henry Estes, and about which said Estes testified, defendant said to Williamson: "I believe Harry Estes knows something about what became of the Trent horse, and I will make a proposal to him, and get his confidence, and if he knows anything about the Trent horse I will get it out of him." "And further defendant proposed to prove by said Williamson that, shortly after the proposal was made to Harry Estes, defendant told Williamson he had made the proposal to Estes, and that he was satisfied from what Estes said and did that he, Estes, knew nothing about the Trent horse." The district attorney objected, and the court sustained the objection; to which the defendant excepted.

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Surrounded by these proposed facts, the proposal to Estes was consistent with the conduct of an innocent man; hence their admissibility was clearly proper and legal. Without these surrounding facts, the proposal to Estes only tended to prove defendant a thief generally, but did not tend to connect him with the theft of the horse in question further than the probability that all thieves will steal, and that therefore he stole the horse belonging to the prosecutor in this case. The defendant objected to this evidence, but his objection, which should have been sustained, was overruled; being adduced by the State, he was very evidently and justly entitled to the proposed, but rejected evidence.

The State proved by the witness Paschal that there was a conspiracy, in fact a compact, entered into by and between defendant, witness, and quite a number of others, to engage in the business of horse-stealing generally; and that, before defendant entered into this compact, and afterwards, members of this thieving firm had stolen a number of horses from that vicinity,—to all of which defendant objected. What is the effect of this evidence? What does it tend to prove? Is there any specific tendency indicated by it? Does it disclose an intention to steal the horse in question? It does, but with no greater degree of certainty than to steal every horse in range of the operations of this band of thieves. A. enters into a conspiracy to steal horses generally; a number of horses are taken by members of the conspiracy. B.'s horse is stolen. Is this evidence against A.? Again, if A. did enter into this agreement, and horses were stolen by members thereof, can the conclusion be higher, or be more pointed or specific than one drawn from the fact that A. is an incorrigible and confirmed horse thief? We think so; for in this case the theft of any horse is within the scope of the unlawful compact, and is embraced within its bounds, and each member thereof is in law and morals an actor. We are not to be understood as holding

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that this proof, standing alone, would be sufficient to convict; we are discussing the competency or admissibility of evidence.

But let us return to the evidence of Paschal. His evidence on this matter is to the effect that defendant entered into the conspiracy to steal horses generally. There is no complicity of defendant shown by his evidence, in the thefts of the horses which were taken in that vicinity. We do not allude to the horse charged to have been stolen in this indictment. A conspiracy to steal horses generally, without a participation by defendant in any theft being shown, is all that can be inferred from the evidence of Paschal upon this point. What is the rule? It is held by a number of authorities that "where the evidence tended to *show a privity and community of design* between the prisoners to commit offenses of the *character charged* against him, great latitude is allowed in giving in evidence the acts, declarations and conduct of each and all the associates in furtherance of their common unlawful purpose; and such acts, declarations and conduct are evidence against each of them." This proposition is announced in *Mason v. State*, 42 Ala. 532, and is made to apply to an offense which was not specifically intended, but was embraced under the general purpose of the conspiracy, to wit, to engage in the burglary business generally.

The principle stated in these cases is this: that when a privity and community of design is shown between other parties and defendant to engage in the commission of offenses of the same *character* as that *charged* against defendant, great latitude is allowable in giving in evidence the acts, declarations and conduct of each and all of the associates, in furtherance of the common unlawful purpose; and such conduct, acts and declarations are evidence against each of them. The point at issue is this: if the conspiracy has for its object the commission of some specific offense, such as the theft of a certain horse, or

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the horses of a certain man, the conspiracy being first shown, the acts, declarations and conduct of each member are evidence against each. But, if the object be the commission of offenses of a certain character, but no specific offense, are these acts, declarations and conduct, evidence? In the one case the object is to steal A.'s horses; in the other, the object is to steal any and every person's horse. In the latter case, the purpose being so broad, A.'s horses would certainly be included therein; and the rule applicable to the one would apply to the other. Nor is the principle affected by the fact that the evidence fails to show that defendant participated in the thefts committed by the other members; for, if they were committed in furtherance of the common design, each member of this company of rogues would be held culpable, notwithstanding he did not take part in, or advise, or agree to this particular offense. The object of this copartnership being so broad and comprehensive in its nature, each member thereof is fully authorized to steal the horse of any person, having for his support the advice, consent and approval of all the conspirators. *Mason v. State*, 42 Ala. 532; *Carroll v. Com.* 84 Pa. St. 107; 2 Hawley, 290; *Campbell v. Com.* 84 Pa. St. 187; *Hester v. Com.* 85 Pa. St. 139.

Now let us apply this doctrine. A. is upon trial for the theft of B.'s horse; the State adduces evidence strongly tending to connect him with the theft. To strengthen and corroborate this evidence the State proposes to prove that he belongs to a band of thieves, who are confederated together for the purpose of stealing horses generally; — is this legal evidence? Though this is a question in regard to which the authorities are not harmonious, we believe that the admissibility of this evidence rests upon principle, and has for its support a solid foundation in the rules of justice.

The witness Paschal swears to this conspiracy. He, however, is a confessed thief and an accomplice to the

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theft of the horse in question. Is he corroborated? We think not. The only attempts at corroboration are, first, that defendant and the other members were in the habit of meeting in the woods near — store. A number of witnesses testify to these meetings. But no witness swears to any fact tending to show that these meetings were for any such purpose as that claimed by Paschal. On the contrary, the evidence most unquestionably proves that not only the persons claimed to be members of the conspiracy by Paschal met there, but others, and in the woods; and the evidence clearly shows the purpose of these meetings, which was to engage in the very baneful and unprofitable business of playing cards. The second ground upon which a corroboration is claimed is that defendant and his son were seen at a time corresponding with that sworn to by Paschal, leading a horse suiting the description of O'Banion's, in the direction of the place at which Paschal received the O'Banion horse from defendant and his son. The evidence leaves it very doubtful whether this was the horse of O'Banion or that of the defendant; they having horses quite similar, especially in color. If there is a preponderance, we think it is in favor of defendant. To be a criminative fact, the proof must show clearly that the horse was O'Banion's; for conclusions cannot rise higher or be more certain than the facts from which they are made. If this was the horse of O'Banion, Paschal was not only corroborated, but very strongly supported. If not, there was no corroboration. There were a great many facts sworn to by Paschal which were also testified to by a number of witnesses. None of these facts, however, tended in the slightest degree to connect defendant with the crime. This character of corroboration will not suffice.

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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J. T. LOWE v. THE STATE.

1. **THEFT — INDICTMENT.**— Though one who takes up and holds an estray in conformity with the estray laws acquires such a special property in the animal as that an indictment for theft of it may allege the ownership in him, a mere partial compliance with the estray laws, such as preliminary advertisement, manifesting an intention to estray, does not confer either right of possession or special property, and an indictment that alleges the ownership in an unknown person is sufficient.
2. **CONTINUANCE.**— Application for a continuance was filed on September 19th, and recited the presence under subpoena of the witness at the previous term of court and his subsequent temporary departure from the State, and alleged that on the 13th of September defendant “asked” for an attachment for the witness. *Held*, that a total want of diligence is manifest, and the continuance was properly refused.
3. **CHARGE OF THE COURT — PRACTICE.**— Even if tenable under any circumstances, the objection that the charge of the court was not filed until the day after it was read to the jury, comes too late when made for the first time in this court.
4. **SAME.**— The indictment charged the defendant and Wm. Lowe jointly, and the caption of the charge so stated the case, but the first paragraph announced to the jury the severance of the two, and the separate trial of the defendant. *Held*, that the charge so stating the case raises no presumption that it was prepared for or given in a case other than that on trial. And if it had been, and was applicable to the case on trial, the fact that it had been used in another case would not be ground for new trial.
5. **EVIDENCE.**— See evidence held sufficient to sustain a conviction for theft of cattle.

APPEAL from the District Court of Ellis. Tried below before the Hon. G. N. ALDREDGE.

The indictment charged the defendant and William Lowe jointly with the theft of two cows, one steer and one calf, estrays, and the property of some person unknown. Upon a severance the defendant was tried, found guilty, and awarded a three years' term in the penitentiary.

The witness Wm. Finlay, testifying for the State, stated

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in substance that on the 22d and 27th days of February, 1880, he posted notices of the presence of estray cattle on his premises, and of his intention to deal with them as authorized by law unless claimed within twenty days. That about the last of February a man who announced his name as Jackson called on him and told him that he had been to Waxahatchie and there ascertained that witness had posted some cattle which he, Jackson, had lost from a drove some time before, describing them accurately. Upon Jackson's swearing to the cattle, the witness, upon the advice of his brother, delivered them to him. About this time the defendant and another man rode up, and asked if witness had cattle for sale. The witness sold him a small steer, and told him that Jackson would probably sell the cattle turned over to him by the witness. The witness introduced the defendant and Jackson, and they traded, the defendant paying Jackson fifty-seven dollars, but taking no bill of sale. Jackson was riding a fine bay stallion or ridgeling, defendant a bay pony, and the man with defendant a dun or yellow horse. About a month afterwards, the witness at the Mansfield mill saw the bay stallion Jackson rode and the dun horse ridden by the defendant's companion on the occasion referred to; they were hitched to a wagon, which circumstance excited his suspicions. He found the owner of the wagon and addressed him as Jackson, but he turned and left the witness, who soon ascertained that his name was not Jackson, but was Wm. Lowe, a brother of the defendant. The witness watched the wagon until near night, but failed to see the man Jackson again. He then wrote on a piece of paste board, addressed to Jackson, *alias* Wm. Lowe, Jr., directions to return a certain bunch of cattle which he and defendant "fraudulently took," etc., in order to save trouble, and threw the paste board in the wagon. The witness identified Wm. Lowe as the man Jackson, and defendant as J. T. Lowe who

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got the cattle. The appearance of Wm. Lowe at the last term of the court was much changed from his appearance when he personated Jackson to get the cattle, and when the witness saw him at the mill. His whiskers and mustache, which were sandy when he got the cattle, and when he was seen at the mill, were dyed black, and he was well dressed in a black suit at the last term of court.

Robert Finlay, a brother of the prosecuting witness, was present during the transactions attending the delivery of the cattle to the assumed Jackson, and his sale of the same to defendant, and with regard to those transactions testified in substance as the prosecuting witness. He would not swear positively that Wm. Lowe and Jackson were one and the same person, but believed them to be.

The testimony of the prosecuting witness showed, also, that about the close of the trade between defendant and Jackson, and after the latter had gone, Joe Bell rode up to the party and asked defendant what he and his companion, one Marks, were doing with the cattle, and that defendant said he had just bought them of a man named Jackson; that Bell asked if he took a bill of sale, and he replied no, that during his life he had never taken or given but one bill of sale. This evidence Bell corroborated. He testified, further, that on the day before these assurances and the alleged purchase, he saw the defendant on a bay horse, and the man Marks on a sorrel horse, riding around among his, witness's, cattle, and Wm. Finlay's and the stray cattle mentioned in the indictment. After examining the cattle for a time, the defendant and Marks rode up to the witness's house, asked about the cattle, whose they were, etc. Witness told them some were his, some were Wm. Finlay's, and that the bunch of muley animals were estrays which had been posted by Wm. Finlay. They again rode out to the bunch and critically examined them. Next morning, about 10 or 11

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o'clock, the same two men, riding the same horses, rode up to witness's house and asked him if he had cattle to sell. Receiving a negative answer they rode on to Wm. Finlay's. The witness followed shortly, and found them with the bunch of cattle.

Another witness testified to having seen the defendant in possession of the cattle described, and still another testified that, being asked what he intended to do about this prosecution, the defendant replied that if he could get Wm. Lowe to go with him, he would leave and go to Montana Territory.

For the defense, Wm. Perry testified that on the day of the alleged theft, February 23d, he accompanied the defendant and Marks to hunt a cow of his which he proposed to sell defendant; that not finding the cow, he made a bill of sale conveying the cow to defendant, and received pay therefor. Wm. Lowe did not accompany them, but staid at Lowe's house, where he was when the witness returned at eleven o'clock.

A. M. Marks testified to the same fact as testified by Perry, and further, that after leaving Perry they, witness and defendant, went to Wm. Finlay's, and after defendant bought a steer from Finlay, the latter introduced him, defendant, to a man named Jackson, from whom defendant bought the cattle in question, paying Jackson \$57 therefor. The bay colt defendant had was the only stallion owned by any of the family, was only two years old and was not broken to harness. The horse ridden by witness (the dun or sorrel) would not work in harness.

Other members of the family testified that the only stallion owned by defendant was a two-year old, unbroken to harness, and that Wm. Lowe did not leave the home-place on February 23d.

Anderson & Price, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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WHITE, P. J. The indictment charged that the stolen animals were estray cattle, that they were taken from the possession of the owner, and that the owner was to the grand jury unknown. This allegation, it is insisted, is not only not sustained, but is directly and positively contradicted by the evidence. Wm. Finley, a principal witness for the State, testified that on the 27th of February, 1880, he posted notices of his intention to estray the animals if not taken away from his premises within twenty days from date; one of which notices he filed in the clerk's office as required by law. He says: "I had taken no further steps towards estraying the cattle. It was in a few days after this posting that defendant got the cattle."

It is here contended by appellant that this posting of the animals with a view of estraying them gave Finley not only a special ownership in them, but also placed the animals actually in his possession; that the indictment should have alleged the ownership and possession in him and not the unknown owner; and that, such being the state of the proof, the allegations in the indictment were not only unsustained but disproved, and the conviction consequently illegal. Our statute provides that "when one person owns the property, and another person has the possession, charge or control of the same, the ownership may be alleged to be in either." Code Crim. Proc. art. 426.

Under the evidence stated above two questions suggest themselves: 1. Was Finley in contemplation of law the owner of the animals? and 2dly, if not, was his right to possession such as that it was essential that the indictment should charge its violation? A proper solution of these questions will settle the supposed conflict between the indictment and proofs in the case.

Appellant's counsel rely upon *Jinks v. State*, wherein this court say, "from the time Rattan estrayed the property up to the date of sale under the stray laws, he was

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holding the property for the owner, and subject to reclamation by him on proper proof; and from the date of sale he, being the purchaser, became the owner of the property himself. In either event his possession was legal, and the law protected his possession against all persons except the rightful owner, to the time of the stray sale; and having such legal possession it was proper to allege in the indictment that he was the owner of the property." 5 Texas Ct. App. 68. The same principle was announced in *Cox v. State*, 43 Texas, 101. But in each of these cases the action taken by the estrayer in compliance with the estray laws had been such and had gone to that extent that the parties in law were entitled to an interest in, as well as possession of, the animals to the extent at least to which the fees paid out by them might be a lien upon the animal and a legitimate claim against the rightful owner.

But in the case before us Finley had simply posted his notices and filed one of them with the clerk as his declaration of intent to estray the animals if no owner applied for them within twenty days. Rev. Stats. art. 4570. This amounted to no more than an initiatory step indicating an intention to estray the animals; in no other manner had he attempted to comply with the law regulating estrays. There had been no oath, appraisement or bond, the essential prerequisites to the estrayal. Rev. Stats. art. 4571. Without a bond such as the law demanded, he could not have used the animal taken up as estray, for any purpose, because the statute expressly prohibits such use [Rev. Stats. art. 4575], and, furthermore, subjects him to a criminal prosecution and punishment for such illegal use. Penal Code, arts. 770 and 771. In our construction of the law applied to the facts Finley was neither the owner of the animals nor in possession of them. They were estrays whose owner was unknown, as was charged in the indictment.

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The application for a continuance did not state facts sufficient to excuse the apparent want of diligence to secure the attendance of the witness Berry. He had been served with subpoena, and was in attendance at the February term. The application was made on the 19th of September, 1881. Affiant states "that, on Tuesday, the 13th day of September, he asked for an attachment for said witness, but was informed that he was now temporarily absent from the State." Learning him to be absent from the State on the 13th, defendant did not even then do more than "ask for an attachment." He did not have it issued and placed in the hands of the proper officer in order that it might be shown whether his information to the effect "that he was now temporarily absent from the State" was correct or not. The statement is vague and indefinite in itself. Who informed defendant that Berry had left Ellis county? And when did Berry leave? And what were the circumstances which excused or prevented defendant and his counsel from finding out that so important a witness as this Mr. Berry was absent from the State and would not in all likelihood appear and testify for him on his trial? The session of the court commenced on the 5th day of September, and defendant in the exercise of proper diligence should have been inquiring for his absent witnesses then. He does not do so until the 13th, when, not seeing Berry about the court, it occurs to him that he will "ask for an attachment;" which he does, when he is informed by the clerk or sheriff or some one else, we are not told whom, that Berry is absent and in the State of Illinois. How is it that other parties can so readily inform him of the whereabouts of his witness and he, the one of all others most deeply interested in his whereabouts, know nothing of him? These are questions which most naturally suggest themselves,— which certainly were capable of explanation,— and which defendant does not attempt to explain.

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His failure to explain them was doubtless the cause inducing the court to overrule his application for continuance, and in view of them we cannot say that the court erred in the ruling.

With regard to the filing of the charge of the court to the jury, it is provided by statute that "the general charge given by the court, as well as those given and refused at the request of either party, shall be certified by the judge and filed among the papers in the cause; and shall constitute a part of the record of the cause." Code Crim. Proc. 597. This statute has always been held mandatory to the extent that the filing was essential to the proper authentication of the charge as a record paper in the cause when the record was to be sent up on appeal to this court, for revision; and that, unless it bore the file-mark of the clerk, this court would not consider it as a paper properly belonging to nor constituting part of the record. *Richarte v. State*, 5 Texas Ct. App. 359, and authorities cited. But it is only where there appears to be a purported charge which shows affirmatively never to have been filed, that the want of file-marks would invalidate the paper. And it is true that this court has time and again recommended as the proper practice that, after reading his charge, the judge should hand it to the clerk that it may be filed by him before being handed to the jury. *Krebs v. State*, 3 Texas Ct. App. 348. We still insist that this is the proper practice and would avoid all such unnecessary and oftentimes fatal objections of this character.

But in the case before us the objection is not that the charge was not filed at all, but that it was filed the day after it was read to the jury. It is not denied that this paper is the charge as actually read by the judge, and it is signed officially by the judge. No objection was urged to the time and manner of filing, in the court below, and it is submitted for the first time on this appeal in this

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court. If the objection were at all tenable under any circumstances, it comes too late as here presented. In so important a record paper as the indictment, our Supreme Court, in *Terrell v. State*, 41 Texas, 463, held that "if an indictment be found and returned by the grand jury in the District Court, and then filed by the clerk, its validity is not affected by a mistake made by the clerk in the date of his entry in indorsing upon it the date of the filing. Such mistake could not avail to sustain a motion in arrest of judgment." In this case we find a file-mark upon the charge, and in the absence of any direct showing to the contrary we will presume a *lapsus pennæ* or mistake on the part of the clerk in his indorsement of the date, rather than an omission of duty on the part of the judge and the clerk.

Another objection to the charge, urged in connection with the above, is that J. T. Lowe was alone on trial, whereas the charge states the case as being *The State of Texas v. J. T. Lowe and Wm. Lowe*, and therefore must have been prepared and given in a different case than the one on trial. But we find that the indictment was against J. T. Lowe and Wm. Lowe jointly; the number of the case is the same as the one appearing in the charge, and in the first paragraph of the charge the court announces that "the defendants herein have severed and J. T. Lowe is alone on trial." In *Austin v. State*, 42 Texas, 355, where a similar question to the one here suggested was passed upon by the Supreme Court, it was held that "the fact that the charge read to the jury on the trial of a criminal case bore the style and file-mark of another criminal cause raises no presumption that it had been used on the trial of another party, nor, if applicable to the case, would the fact that it had been so used be a ground for new trial." As we have seen, however, the style of the cause as stated in the charge in this case was explicitly correct, and, when considered in connection with the

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first paragraph above noticed and the other portions of the record, could not mislead, or by any possibility create the slightest doubt or confusion with regard to the cause upon the trial of which it was used.

As to the evidence, the sufficiency of which is questioned, it may be admitted that there is a conflict, but yet, if the jury believed the State's chief witness,—and it was their peculiar province to pass upon his credibility,—the facts deposed to by him were amply conclusive of defendant's guilt. We will not interfere with a verdict simply because the evidence is conflicting. The able argument and briefs of counsel are quite persuasive as well as plausible, but we cannot divest ourselves of the conviction impressed upon us by a most careful consideration of the record that it presents a trial eminently fair and impartial, in which no error was committed requiring a reversal. The judgment is therefore affirmed.

Affirmed.

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WILEY BAKER v. THE STATE.

1. THEFT — EVIDENCE.— Indictment laid the possession of the animal alleged to have been stolen in M. M. A. as administrator of J. T. A., deceased. In his evidence, the administrator claimed his right of possession under the inventory of the property of the estate of the deceased, filed April 15, 1878. The defendant to meet this evidence proposed to introduce the inventory and appraisement, which, upon objection by the State, was excluded. *Held*, error.
2. SAME.— See the opinion for evidence, held insufficient to support a verdict of theft of a mare.
3. CUMULATIVE PUNISHMENTS were not in vogue prior to the adoption of the Revised Codes, and cannot now be assessed for offenses committed prior to the adoption of that Code. Such a construction would make the provision of the Revised Code of Procedure (article 800) an *ex post facto* and unconstitutional enactment.

APPEAL from the District Court of Hunt. Tried below before the Hon. G. J. CLARK.

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Being convicted under an indictment for the theft of a mare, the defendant was awarded a term of seven years in the penitentiary, to begin when an antecedent term expired.

The opinion sufficiently discloses the case.

E. B. Perkins, for appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Possession of the animal charged to have been stolen was laid by the indictment in "one M. M. Arnold as administrator of the estate of John T. Arnold, deceased, and who was holding the same as such administrator." The theft was alleged to have been committed on the 10th day of June, A. D. 1879.

M. M. Arnold, when upon the stand as a witness for the State, testified: "I hold the filly as the property of the estate of John T. Arnold, deceased, and rendered in the inventory of the property of said estate that was filed in the clerk's office of Hunt county on the 15th April, 1878. The filly is described in the inventory as a young colt." When the animal was found, after defendant had sold her, she was identified as the property of the estate of John T. Arnold by one Atkinson; and M. M. Arnold, the administrator, after she was thus identified, says: "I took her home and branded her with the figures 11, turned her out, and she went back to her range."

Defendant claimed that the animal belonged to and that he had taken it as the property of his mother, Mrs. Baker. To negative the ownership of Arnold's estate, defendant proposed to introduce the inventory and appraisal of the said estate, which had been testified about by M. M. Arnold, the administrator. On objection by the prosecution, the court excluded, or, rather, refused to allow, the inventory to be introduced. This was mani-

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festly error. As we have seen above, the administrator claimed to hold the animal alone by virtue of the inventory. Defendant most clearly had the right to show, if he could, that the claim was not sustained or supported by the inventory.

Again: we are not satisfied with the sufficiency of the evidence to support the verdict and judgment. Thomas Stewart testified: "I was the father-in-law of John T. Arnold, deceased; his wife is my daughter. I knew the John T. Arnold stock, and knew all of them except some that were lost, that he owned in partnership with another party. I knew the gray mare that he owned, and all the colts. I helped John T. Arnold to brand his horses in the spring of 1877. We drove them all up off the range *and branded all of them*. I knew the bunch that ran near Nat Parker's. There was none of them that we did not brand in the spring of 1877." Now, if this witness is not mistaken, the animal in question could not have belonged to the estate of Arnold, because she was unbranded when the administrator got her, and he tells us he branded her in the 11 brand himself, before turning her upon the range.

Another error committed by the court was in rendering judgment that the punishment assessed in this case was to commence at the expiration of a former judgment and sentence that had been rendered against defendant. The offense for which defendant was being prosecuted in this case was charged to have been committed on the 10th day of June, 1879, before the Revised Codes went into operation. The Revised Code of Criminal Procedure, art. 800, provides, it is true, that cumulative terms in the penitentiary adjudged at the same term of court shall be so tacked that each subsequent term shall begin at the expiration of the preceding one. But the application of this provision to offenses prior to the Revised Codes is error, because, being more onerous than the pre-existing

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law, it would be *ex post facto* if enforced for "antecedent offenses." *Hannahan v. State*, 7 Texas Ct. App. 664; *Prince v. State*, 44 Texas, 480.

For the reasons indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

CHARLES GARDNER v. THE STATE.

1. CHARGE OF THE COURT — PRACTICE IN THE COURT OF APPEALS.— In a trial for murder the law of self-defense, though invoked by the evidence, was charged in a merely negative form, and the charge was applicable to a case in which the accused gave the provocation, though there was no evidence tending to support that theory. But the defense neither excepted to the charge at the time nor relied on its errors in his motion for a new trial, and it is not obvious that the accused, who was convicted of manslaughter, was seriously prejudiced by the errors in the charge. *Held*, that the objections to the charge come too late, being mooted in this court for the first time.
2. MANSLAUGHTER — EVIDENCE.— The wife of the deceased was the only witness to the killing, and she was allowed, over objection by the defense, to testify that the accused, a few minutes before he shot her husband, made indecent proposals to her; but of this fact the deceased was never apprised, and nothing indicates that it influenced or explains the motives or acts of either the deceased or the defendant. *Held*, that the testimony was irrelevant and of a character likely to incense the jury against the defendant, and to deprive him of a fair trial; and objection having been duly made by the defendant (who was convicted of manslaughter), the admission of the evidence was material error.

APPEAL from the District Court of Tom Green. Tried below before the Hon. A. O. COOLEY.

The indictment charges the appellant with the murder of Martine Ortis, on September 1, 1881, by shooting him with a pistol. The jury found appellant guilty of man-

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slaughter, and assessed his punishment at two years in the penitentiary.

The appellant and Thomas Gardner, it appears, were brothers and partners in a herd of cattle which they kept on herd in Tom Green county, and Martine Ortis, the deceased, was a Mexican who had been but a short time in their employ when he was killed at the Gardners' camp. That Ortis was fatally shot by the appellant early in the night of September 1, 1881, seems not to have been seriously controverted by the defense, who obviously contested the case on the theory of justifiable homicide in self-defense.

Maria Antonia Ortis, the wife of the deceased, was the only eye-witness of the homicide, and the principal witness for the State. Testifying through an interpreter, she stated that no one was present at the camp but herself, the deceased and the defendant, when the latter fired his pistol three times at the deceased, who did not live a minute after the shots were fired. This occurred about seven o'clock in the evening; it was about dusk. There was at the camp a wagon which belonged to the deceased and witness, and they sometimes slept close to it and sometimes off at some distance from it. The deceased had been gone to Joe Glenn's store about half an hour, leaving witness at the camp by herself, when the defendant came there, and wanted to stay with witness. "He said he wanted to sleep with me; he talked to me about staying with me. I did not want to sleep with defendant; I told him to go away from camp before my husband came back. I told him twice to go away; he did not go away. Defendant and I were standing close to the left hand front wheel of the wagon, looking towards the tongue." Witness was leaning against the wheel, and while she was standing there the deceased came into camp from the direction of the store. Deceased's dog came in advance of him, and as he himself came up the

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defendant stepped back to a little bush which was about three yards in front and to the left of the wagon. When the deceased came up he called to witness, saying "where are you, Antonia?" She replied "here I am," and then he asked her where his pistol was, and she told him it was on the front of the wagon. The pistol was in the scabbard and hanging by the belt on the wagon-bed. Deceased hung the belt over his left shoulder, with the pistol in the scabbard, and the scabbard on the belt, and it hung so that the pistol was on his back. When deceased asked for his pistol the defendant was standing at the bush, but when he fired he was standing at the point of the wagon tongue, and deceased was at the wagon-bed, between the left front wheel and the tongue, with his back towards the defendant. At the first shot the deceased dodged downwards. The other two were fired in quick succession, and the deceased fell down and died in less than a minute. He was making no demonstrations to hurt the defendant when the latter fired on him within half a minute after he threw his pistol belt over his shoulder. Witness was looking at the defendant when he commenced shooting. It was about three and a half yards from the bush to the point of the wagon-tongue. As the deceased's dog came into the camp the defendant saw it and stepped to the bush, saying "There comes Martine's dog," and witness replied "And there comes Martine now." The deceased said nothing when he was shot or when he fell. He fell on his left side against the front wheel; his pistol remained in the scabbard, and his arms lay on the ground on each side of him. After the shooting, the defendant walked slowly off and returned no more that night. He did nothing to help care for the deceased's body. Witness cried loudly for help, but no one came. As soon as the deceased was dead, she went for assistance to the house of Mr. Westfall, the storekeeper for Joe Glenn. There were three

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wounds on the deceased; two of them were in his right side and the third through his right ear. Witness did not know from what direction the bullet came which passed through his ear, but she was certain that his back was to the defendant when the latter commenced shooting. There was no wound in deceased's head, except a slight scratch just back of the right ear. The wounds in his body were about the middle of the right side; one rib was between the two bullet-holes. There was nothing in the hands of the deceased when he fell. Witness stayed at the storekeeper's house that night, but after first going there she went right back to the camp, and on her way there met the deceased's brother, and he went with her to the camp, where she then saw Thomas Gardner and other persons whose names she did not remember. Deceased's brother took the pistol off of the left arm of the deceased. It was in the scabbard and lying on the ground, and the left arm of the deceased was lying on it when his brother took it up. Defendant and the deceased had been herding horses together during the day, and ate supper together, very friendly, a little while before the killing.

The cross-examination of the witness elicited but little in addition to her testimony in chief. She denied that she had told Mr. McIlvaine that the defendant did not propose to sleep with her the night of the killing. What she did tell McIlvaine was that the defendant had never made improper advances to her until that night, but that he did then. She also denied that, the day after the examining trial, she had asked McIlvaine whether the defendant could contradict her if she had told what was not true. (These inquiries specified time and place of the imputed statements, and McIlvaine, testifying for the defense at a subsequent stage of the trial, explicitly contradicted the witness as to both the statements which she denied.) Witness stated that the defendant and the de-

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ceased had been on the very best of terms until the time of the killing.

The re-direct examination of the witness gave her account of what passed between her and McIlvaine on the occasions referred to in her cross-examination, and in the course of it she said that McIlvaine was the interpreter at the examining trial,—a statement which he contradicted in his testimony for the defense. With the evidence of the deceased wife, which is greatly condensed in the foregoing statement, the prosecution closed in chief.

Rufus Thomas, testifying for the defense, stated that in the forenoon of the day of the killing he and the deceased were herding cattle together, and in conversation the deceased said that he intended to kill the defendant within three days because the defendant had put his (the deceased's) brother on a wild horse. This was told to witness by the deceased about nine or ten o'clock in the forenoon, and witness went to dinner at the camp of the defendant, and told the defendant that the deceased intended to kill him within three days, and that he had better look out. Ben McGrew was present when witness told the defendant. The witness was a herdsman for Joe Glenn and the deceased a herdsman for the Gardners at the time they had the conversation.

The evening of the killing the witness, with Thomas Gardner and Ben McGrew, went from the Gardners' camp to the store, and while they were there the deceased came to the door, looked in, and immediately left. Witness did not know from what direction the deceased came to the store, nor in what direction he went away. While witness was at the store he heard three pistol shots in the direction of the camp, and he, with Thomas Gardner, Ben McGrew, and a crippled Mexican understood to be a brother of the deceased, immediately ran to the camp. Deceased was lying there on his back, dead, with his feet pointing towards the point of the wagon tongue and

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about five feet from the wagon tongue. When witness and his companions reached the camp no one else was there; but the wife of the deceased soon came there from the direction of Westfall's.

On his cross-examination the witness stated that when he told defendant of the deceased's threat to kill him, defendant only replied "Is he?" At the time the deceased made the threat he just rode up to witness and told it to him, and said nothing more.

Ben McGrew, for the defense, testified that he was living at Joe Glenn's at the time the deceased was killed, and was at the Gardners' camp on the day of that event, about noon, when Rufus Thomas came into camp and to where the defendant and the witness were, and told the defendant that the deceased had threatened to kill him, the defendant, within three days. That night the witness, and Thomas Gardner, Rufus Thomas and the crippled Mexican were at the store, and, three shots being fired in the direction of the camp, they all ran down there,—the crippled Mexican coming in about a minute behind the others. Deceased was lying on his back, dead, with his body about four or five feet from the wagon tongue. He had the belt over his left arm and his right hand on the handle of the pistol, which was partly drawn out of the scabbard. His left hand was on the scabbard of the pistol. The right hand was holding the handle of the pistol, but not grasping it tight. The lame Mexican took the pistol off from deceased's left arm, and put it around his own waist. The wife of the deceased came into camp that night from the direction of Westfall's, and she stayed in the camp all that night along with witness and his brother. She asked witness and his brother to help her wash the body, and they did so. There was one bullet-hole in the deceased's right side, under the arm. There was another bullet-hole through his right ear, and a slight graze behind it; and there was a red mark on his right

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cheek in line with the ear, but not breaking the skin. The cross-examination elicited nothing material.

J. D. Spears, sheriff of the county, testified for the defense that a warrant was issued for the defendant, and witness tried to find and arrest him, but failed to find him; and on the day of the examining trial, which was about three weeks after the killing, the defendant voluntarily surrendered himself.

Joe Glenn, for the defense, testified that he examined the body of the deceased the day after the killing. Speaking of the bullet-hole through the right ear, witness said that in front, where the ball entered, it was smooth, but that behind the ear the skin was torn and ragged. There was a slight scratch on the head just back of the ear, and a red mark on the right cheek in line with the ear, but the skin was unbroken. And with reference to the bullet-hole in the right side, the witness stated that, unless the arm was raised, the hole could not have been made without the arm also being perforated by the ball. The wound could not have been made when the back of the deceased was towards the person shooting.

The defense introduced A. McIlvaine, mentioned in the testimony of the deceased's wife, but the substance of his evidence has already been stated in connection with hers.

In rebuttal the State introduced Charles Mullins, a deputy sheriff, who testified that in the night of the killing the defendant's witness Rufus Thomas came to San Angela and informed witness of the homicide. The next day witness went with General Portis to the Gardners' camp to hold an inquest on the body of the deceased. On their way back to San Angela they met Rufus Thomas going back towards the camp. General Portis asked Thomas if the deceased had made any threats against the defendant. Thomas replied that the deceased had said to him that the defendant had driven the lame brother of deceased out of camp, and that he, the deceased, would kill the defendant or any other man who imposed on his lame brother.

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Thomas said that no other threats had been made by the deceased.

General D. Y. Portis, for the State, testified that he was a justice of the peace of Tom Green county, and, on the day after the killing, he held an inquest on the deceased. Witness had heard the testimony of the preceding witness Charles Mullins, and corroborated it fully and circumstantially.

— Ortis, for the State, testified that he was a half-brother of the deceased, and had been working for Thomas Gardner but was not in his employ at the time of the killing, though he was staying at the camp with the deceased and his wife, and was there about noon on the day of the killing. The wife of the deceased cooked dinner for deceased and the defendant, and they ate dinner together, friendly. While they were there in camp there was nothing said to the defendant by the witness Thomas about threats. After dinner, the defendant told witness to get on his horse and go and help the deceased to herd the cattle. Witness went, and was gone nearly an hour, and could not say who was in camp while he was absent from it. About dusk, witness was at the store with Thomas Gardner, Rufus Thomas and Ben McGrew. He heard three shots in the direction of the camp, and they all ran down to the camp. Witness got there soon after the others, and saw the deceased lying dead, near the wagon wheel. He was lying a little on his left side. His pistol-belt was over his left arm, and that arm was on the pistol, which was on the ground, fully in the scabbard and not drawn out. His right arm was lying on the ground, by his side. Witness took the pistol off of the deceased, and put it around his own waist.

Bentley, Ferguson & Spence, for the appellant, filed an able and elaborate argument.

H. Chilton, Assistant Attorney General, for the State.

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HURT, J. The appellant was convicted of manslaughter, and his punishment assessed at two years' imprisonment in the penitentiary.

The evidence, we think, required a charge on the law of self-defense. This was given by the court, negatively. This was error. The court below should apply the law appropriately to the defense or defenses of the prisoner whenever there is evidence tending to support them. The court charged the law applicable to a case in which there was evidence tending to show that defendant provoked the difficulty or produced the occasion, etc. There was no evidence tending to make such a cause; hence this charge was not called for, and it was wrong to give it.

But neither of these charges was excepted to at the time, nor did defendant ask a proper charge on the subject of self-defense; nor were they, or either of them, made a ground for a new trial. It is the duty of the trial judge in a written charge to set forth the law applicable to the case; and this must be done, whether asked for or not. But, to authorize this court to reverse a judgment because the charge fails to set forth the law applicable to the case, or because an abstract proposition is contained in the charge, the proper charge must have been requested and refused, or the defendant must have objected at the time. Code Crim. Proc. art. 685.

The right to reverse a judgment upon these grounds is derived from another source, although no objection was made, nor the proper charge requested and refused. By art. 777, Code Crim. Proc., it is provided that, "New trials in cases of felony *shall* be granted for the following causes, and for no other." . . . 2. "When the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." It is held in *Bishop v. State*, 43 Texas, 390, and in a number of cases subsequent to that case, "that if it appears that the court has misdirected the jury as to

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the law, or has committed any other material error *calculated to injure the rights of the defendant*, and that these errors were called to the attention of the court by being made a ground for new trial, the action of the court in overruling the motion for new trial is such an error as will justify the Supreme Court in reversing the judgment." It will be seen that this ground for reversal constitutes an exception to the rule stated in art. 685, Code Crim. Procedure. We are not disposed to engraft upon the article other exceptions, unless it is *evident* that an injury has been done defendant; not merely an injury, but one of a radical or serious character.

If defendant had brought himself within either of the rules above stated, we would reverse the judgment upon these defects in the charge; but, not having done so, we are of the opinion that he is too late, urging as he does, for the first time, these errors in this court.

The State proved, over the objections of defendant, that he had made improper advances to the wife of the deceased, on the night of but prior to the killing. These proposals were not communicated to deceased, nor did he ever know of them, so far as the record shows, at any time. They were made in the absence of deceased, nor does the evidence show, or tend to show, that deceased suspected anything was wrong in regard to this matter. This being the state of the case touching this matter, we are unable to see the relevancy of this evidence. It could not possibly tend to explain the conduct of deceased; nor could it act as a provocation to induce deceased to make the attack upon defendant, if any was made. It certainly could not have been a motive for the killing, nor was it calculated to explain the conduct of defendant, he being fully aware that deceased was not informed of his conduct. There could have been but one effect produced by this evidence, and that was to seriously prejudice defendant with the jury. He stood before them in a bad

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light; indeed in the light of a wretch who had not only attempted to destroy the conjugal happiness of deceased, but had finally, in the presence of his wife, taken his life. This evidence, we think, was not only irrelevant, but was calculated to arouse the jury to such a degree of contempt for, and indignation towards defendant, as would render them incapable of considering in an impartial light his defense, although it may have been a legal one. We are not expressing an opinion as to whether defendant's plea of self-defense was or was not sustained by the evidence. He had the right to an impartial trial; to require the State to convict him upon legal evidence. This, we think, was not done.

The other assignments are not well taken. For the above error the judgment is reversed and cause remanded.

Reversed and remanded.

JOHN WILLIAMS v. THE STATE.

1. THEFT — CHARGE OF THE COURT — POSSESSION OF RECENTLY STOLEN PROPERTY AS EVIDENCE OF THE THEFT. — It was error to charge that the unexplained possession of recently stolen property is a fact from which alone guilt of the theft may be inferred, irrespective of the attending and surrounding circumstances, and particularly of the further inquiry whether there was occasion and opportunity for explanation by the accused.
2. VENUE OF THE OFFENSE — PRESUMPTION. — In a trial for horse-theft the trial court charged the jury that if the horses, prior to the theft, were last seen in the county where the venue was laid, the law presumed that they stolen in that county. *Held*, erroneous because there is no such legal presumption, and because the charge was on the weight of the evidence and invaded the province of the jury.

APPEAL from the District Court of Washington. Tried below before the Hon. I. B. McFARLAND.

The indictment charged that the appellant, on or about the 28th of February, 1881, stole, took and carried away

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from the possession of Thomas Dever, the owner, four certain horses. The verdict pronounced the appellant guilty, and assessed his punishment at ten years in the penitentiary.

According to the proof the owner of the horses lived in Washington county but not more than two miles from the line between that county and the county of Austin. The horses were in the habit of going to graze in an old field which was much nearer the Austin county line than their owner's premises, and, before their disappearance, they were last seen in or near the old field, and the defendant and his brother were seen in or about the same field the evening on which the horses failed to return home as usual. The defendant's brother lived near the old field. The owner looked for his horses without avail in that section of country, but got information which caused him to send a warrant for the arrest of defendant in Fort Bend county, where he lived. The horses were found in the possession of the defendant at his home in Fort Bend county.

No brief for appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The court below charged the jury that, "The possession of property recently stolen is a circumstance proper to be given in evidence to the jury, and from which the jury, if the possession remain unexplained, may infer guilt; but it is not of itself conclusive of the fact."

Such a charge as this has been denounced and condemned by the Supreme as well as this court, in terms so clear and strong as should have placed this question at rest in this State. But it seems that these unqualified condemnations by our Supreme Court, and the equally strong and unmistakable denunciations of this court, have

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proved unavailing. We are not disposed, if we were competent, to add anything to that which has already been written on this subject; we simply cite and recite these authorities: Arts. 677 and 678, Code Crim. Proc.; *Mon-dragon v. State*, 33 Texas, 480, is overruled in *Perry v. State*, 41 Texas, 483; *Thompson v. State*, 43 Texas, 268; *Parish v. State*, 45 Texas, 51; *Foster v. State*, 1 Texas Ct. App. 363; *Alderson v. State*, 2 Texas Ct. App. 10; *Watkins v. State*, 2 Texas Ct. App. 73; *Allen v. State*, 4 Texas Ct. App. 581; *Williams v. State*, 4 Texas Ct. App. 178.

The court also charged the jury that, "If the jury believe from the evidence that the horses, when last seen before the theft, were in Washington county, then the law in the absence of further evidence would presume that they were stolen in Washington county." We are not aware of any authority in which it is held that the law makes any presumptions in regard to the nature and habits of horses. The law does not presume at all in such matters, and, if it did, the presumption attributed to it in this charge would in a great many cases be very far from the truth.

Suppose that a horse had been foaled, raised and is being kept in a certain county; he is taken to an adjoining county, and is last seen loose in that county, traveling, however, in the direction of his old home. We are not informed what presumption the law would make, but a jury would very probably infer that the horse had reached his old home. This being a question of fact, the law makes, *in such a case*, no presumption; and therefore the charge was wrong, because, in the first place, the law does not presume anything in regard to this matter, and, second, this being the case, the charge was upon the weight of evidence and a comment on the same. Arts. 677 and 678, Code Crim. Procedure.

The requested but refused charge of defendant makes

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it, we think, proper for us to make some observations upon the subject of possession by defendant of stolen property, recently after the theft. In quite a number of cases, as well as this, we have been asked to reverse the judgments because (as is urged by appellants) "recent possession of stolen property is not sufficient to sustain a conviction for theft." Mr. Greenleaf, in his work on evidence, states this proposition: that recent possession of stolen property, unexplained, is *prima facie* evidence of the theft. The Court of Appeals has held and now holds that the bare possession of property, recently after the theft, is not of itself sufficient to support a conviction. But this court has never held that possession by the defendant of the stolen property recently after the theft, unexplained, was not sufficient. Let us illustrate. A horse is stolen by some person, the defendant is seen in the possession of the horse recently thereafter, and the State relies upon this possession alone for a conviction,—this will not suffice. But, suppose that defendant is found in the possession of the horse, and his possession is properly challenged, and he is by the circumstances directly called upon to account for his possession, but makes no effort or fails to give a reasonable explanation of his possession; this court has not held, nor is it probable that it will hold, that a conviction in such a case would not be supported by the evidence. For it is a well settled rule, not of law, but of fact, that possession of property recently stolen, by the defendant, *without explanation*, is *prima facie* evidence of his guilt, and not only *prima facie* but sufficient proof,—such proof as will not authorize this court to reverse upon the ground of insufficiency of evidence. The defendant, however, must have been offered an opportunity to explain his possession.

We will again illustrate. Suppose a horse is stolen, and recently thereafter the defendant is seen in possession of the horse; his possession, however, is not challenged —

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he is not called upon directly or circumstantially to explain:—the fact of possession in this case is not sufficient to convict. But if his possession is challenged properly, and he stands mute, the possession, in connection with the further fact of failure to explain when called upon (this being all the evidence in the case), would, we think, support the verdict. We are not treating of the subject, or question, as to when the explanation should be made, whether while defendant was in possession, or whether he would be allowed to explain after he had parted with the possession of the property. This subject presents some very nice points indeed, but they will not be here discussed.

In regard to the sufficiency of recent possession to sustain a conviction, we would observe that it would be a remarkable case indeed, if there were no other facts, either criminative or exculpatory, in the case, besides the mere possession of the property, recently after the theft. The case before us contains other facts besides the possession. But if there was no other, the fact that defendant was found in possession of three of the stolen horses, recently after they were stolen, was arrested and placed in jail, he not making nor attempting to make any explanation, is ample proof of his guilt. There was no effort made on the part of the defendant to show on the trial that his possession of these horses was not felonious; indeed he adduced no evidence on this subject at all.

The defendant moved the court to grant him a new trial, upon the ground of the error in the charge above named. This motion was overruled by the court, and defendant urges these errors in this court for a reversal of the judgment. We are of the opinion that there was error in the charge of the court, as above suggested, and that the court should have granted the motion for new trial. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

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11	280
35	406

SEBE FROSH *v.* THE STATE.

PLEA OF GUILTY is not legal or valid and will not support a conviction unless the accused was admonished of its consequences, and unless the other requirements of the Code were complied with. The record on appeal must affirmatively show conformity with the prerequisites, or the conviction will be set aside as though no plea was made by or entered for the defendant.

APPEAL from the District Court of Washington. Tried below before the Hon. I. B. McFARLAND.

The charge was burglary with intent to steal, and a term of two years in the penitentiary was the punishment assessed by the jury.

No brief for the appellants.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The record shows that defendant pleaded guilty, and nothing further on the subject of his plea. This is not sufficient. It must appear from the record that defendant was admonished by the court as to the consequences of such a plea; that he was sane and uninfluenced by any considerations of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt. A plea of guilty without these prerequisites is not legal, and consequently a judgment thereon is one rendered without plea, and is, of course, without authority in law.

The plea upon which the judgment was rendered being insufficient in law, the judgment must be reversed and the cause remanded. Code Crim. Proc. arts. 534, 518 and 519; *Saunders v. State*, 10 Texas Ct. App. 336; *Wallace v. State*, 10 Texas Ct. App. 407.

Reversed and remanded.

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F. PENNINGTON v. THE STATE.

1. RIGHT OF APPEAL.—FINAL JUDGMENT.—PRACTICE IN THIS COURT.—
Though a convicted defendant has a right of appeal in any criminal action, yet he is not convicted until judgment final is rendered against him. If, therefore, the record on appeal shows no final judgment in the trial court against the appellant, the appeal will be dismissed by this court.
2. JUDGMENT AND SENTENCE.—See the opinion *in extenso* for the requisites of a final judgment in a felony case, and for those of the sentence to be passed thereon. Note recitals which are held insufficient to constitute a final judgment.

APPEAL from the District Court of Henderson. Tried below before A. B. WATKINS, Esq., Special Judge.

The charge against appellant was the burning of J. C. Shelton's gin-house, in Henderson county, on November 15, 1880. The jury returned a verdict of guilty, and assessed a five years term in the penitentiary as the punishment.

W. T. Weaver, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. There is no final judgment in this case, and the appeal will have to be dismissed.

It is shown by the record that the cause came on for trial; that the parties appeared and announced ready; that a jury was impaneled and sworn; that defendant pleaded not guilty; that the jury after hearing the evidence and argument and receiving the charge of the court retired, and afterwards returned into court their verdict finding defendant guilty and assessing his punishment at five years in the penitentiary. And then the recital is, "it is therefore considered, ordered, adjudged and decreed by the court that the defendant, Frank Pennington, be remanded to the county jail from whence he came, there to await the sentence of this court." Clearly this is no final

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judgment. Nor was any final judgment entered in the order overruling the motion for a new trial.

Turning to the sentence, we find it in the following language: "This day comes the district attorney, Jas. S. Hogg, prosecuting the pleas of the State, and the sheriff by order of the court brought the defendant Frank Pennington into open court, who on a former day of this term of the court, to wit, on the third day of November, 1881, had been tried and convicted of the crime of arson, by a jury of Henderson county, Texas; and no legal objection being made by the defendant why sentence should not be pronounced against him, and more than two entire days having passed since the return of the verdict of the jury finding the defendant guilty of the crime of arson preferred against him by bill of indictment, by the grand jury of Henderson county, Texas; it is therefore the order of this court that the defendant Frank Pennington be sentenced to five years imprisonment in the State penitentiary from and after the date of this sentence in accordance with the verdict of the jury aforesaid and the judgment of the court," etc.

These recitals do not constitute a final judgment. It is declared by the Code that in cases of felony "a final judgment is the declaration of the court, entered of record, showing, 1, the title and number of the cause; 2, that the case was called for trial, and that the parties appeared; 3, the plea of the defendant; 4, the selection, impaneling and swearing of the jury; 5, the submission of the evidence; 6, that the jury was charged by the court; 7, the return of the verdict; 8, the verdict; 9, in case of conviction that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury, or in case of acquittal that the defendant be discharged; 10, that the defendant be punished as it has been determined by the jury, in cases where they have the right to determine the amount or the dura-

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tion and place of punishment, in accordance with the nature and terms of punishment prescribed in the verdict." Code Crim. Proc. art. 791.

"A sentence is the order of the court, made in the presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law." Code Crim. Proc. art. 792; *Mayfield v. State*, 40 Texas, 289; *Nathan v. State*, 28 Texas, 326.

It is true that a defendant in any criminal action upon conviction has the right of appeal [Code Crim. Proc. art. 837], but he cannot be said to be convicted so as to be entitled to appeal until a judgment final has been rendered against him, except in *habeas corpus* cases.

Because there is no final judgment, the appeal in this case is dismissed.

Appeal dismissed.

JEFF LINDLEY v. THE STATE.

1. **BILLS OF EXCEPTION—PRACTICE.**—Affidavits will not suffice to authenticate the recitals in a bill of exception which are qualified or disputed by the trial-judge in his note of explanation thereto. If the court refuses a full and fair bill of exceptions, the defendant is authorized to resort to by-standers.
2. **PRACTICE.**—If the State has concealed witnesses from the defense until placing them upon the stand, the defendant's resource is by motion in writing for permission to withdraw his announcement for trial. He cannot test his strength with the State and, in the event of defeat, urge such concealment in his motion for new trial. Fairness is incumbent on the prosecution.
3. **NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.**—Motion for new trial on account of newly-discovered evidence should not be granted when it is clear that the new evidence would not change the result; but when it is doubtful how it would affect the verdict, the doubt should be resolved in favor of the accused. See the opinion for the rule and authorities.

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APPEAL from the District Court of Hopkins. Tried below before the Hon. G. J. CLARK.

The indictment charged the theft of a mule, the property of B. H. Elder. The verdict was guilty, and the punishment assessed by the jury was five years confinement in the penitentiary.

The opinion sufficiently discloses the case.

Harris & Leach, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of the theft of a mule. It appears by bill of exceptions that defendant by his attorney asked the court to "require the prosecuting attorney to disclose the names of the witnesses present upon whose testimony he relied for a conviction in the above case; which the court refused to do, to which ruling the defendant excepted." To this bill was attached this explanation: "That when the request was made the State's attorney referred the defendant's attorney to the order book of the clerk, which he stated contained the names of all the witnesses for the State."

There are affidavits filed and made a part of this record which show this transaction in a different light; these, however, cannot be considered by this court. If the bill of exceptions fails to give a full account of this matter, the defendant is at fault. If the court below should refuse to approve one in which a full and complete history of this matter is shown, then the defendant must resort to bystanders as the law directs. But, suppose there were witnesses concealed from defendant. When they were placed upon the stand the defendant should have, in writing, moved the court to permit him to withdraw his announcement. He will not be permitted to try his strength

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with the State, and if beaten urge this matter for a new trial. *March v. State*, 44 Texas, 64.

We will take this occasion, however, to state that it is the duty of those representing the State to treat the accused with "fairness, and to inflict injury at the expense of the prisoner is no part of the purpose of the law." *Curtis v. State*, 6 Cold. 9. The State cannot afford to engage in the work of chicanery and fraud, especially to convict of felony one of her citizens. When she demands the life, liberty or property of her citizens, her procedure should be bold, liberal and upon high grounds. In the light of the explanations appended to this bill, we cannot see any injury to defendant.

The statement of facts raises the question of the identity of the defendant. A witness by the name of Cun diff swears that he saw defendant leading the mule from the brush into the road near to where the witness was; he did not see the brand, but recognized the mule from its size, color and general appearance. This witness, however, is shown to have made contradictory statements in regard to this matter, by two witnesses. In addition to this his evidence is not of that character which is calculated to rivet conviction on the minds of jurymen. His means of knowledge were not very good. It is questionable, though he testifies to the fact, whether he actually knew the mule in controversy. The State, however, proved by two witnesses that they saw defendant in possession of the mule in Lamar county, but when pressed would not swear positively to his identity. Upon this point Mr. Key states: "I take this to be the same man, though I can't swear it positively." The other witness, Mr. Agnew, when directly called upon to say if he knew defendant to be the same man, answered: "I don't know that I am willing to swear that he is the man."

The defendant moved for a new trial upon the ground of newly-discovered evidence, which is to be found in the

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affidavit of J. C. Jones, which is as follows: "That he is acquainted with Jeff Lindley, the defendant in this cause; that on or about the 15th day of January, 1881, he, affiant, was traveling as a wagoner between Hooten's bridge in Hopkins county and Honey Grove in Fannin county, and that he, as he was traveling said road, saw two men approaching him, and that the affiant recognized one of said parties to be Jeff Lindley, and the other party to be Jas. Ray; that said James Ray and said Jeff Lindley, as affiant thought, approached affiant and affiant spoke to said parties, and after recognizing said parties as Jas. Ray and Jeff Lindley, that affiant then and there saw and recognized that Jas. Ray was one of said parties and that Jeff Lindley was not the other party, but that George Nicholls, as affiant was informed by said other party, was then and there in company with said Jas. Ray; that said James Ray and George Nicholls approached affiant and spoke to affiant, and then and there affiant recognized that Jeff Lindley was not one of said parties, but that said other person, George Nicholls, was then in company with James Ray at the said time, and that after speaking with said James Ray and said other party which affiant recognized as Jeff Lindley, affiant then and there saw and recognized that Jeff Lindley was not one of said parties; that said parties had in their possession one paint or spotted pony, and one brown mule, and three other animals not remembered by affiant, and that affiant noticed said paint or spotted pony by seeing said James Ray riding the same, and that he noticed said black or brown mule in the possession of said parties by their offering to trade the same to affiant; that, while offering to trade said brown or black mule to affiant by said parties, that affiant noticed that said brown mule was branded with the letter S on the left shoulder, and that affiant now will swear and is satisfied that Jeff Lindley is not the man or person that had said mule, and was not the

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person who was in company with said party or either of them. That affiant was absent from Hopkins county during the entire time that this cause has been in progress, and that the affiant has been absent from Hopkins county since the 1st day of March, 1881, and has resided in the county of Cooke and in the Territory of the Chickasaw Nation until the 14th day of September, 1881; and that the affiant never has as yet communicated to the defendant said facts as above set forth, but has only communicated the same to defendant's attorney and friends; that affiant resided about one hundred miles or more from the residence of defendant during the entire time from the date of defendant's arrest to the date of his conviction, and did not and could not have communicated said facts to defendant."

The facts sworn to in this affidavit are material to the very point which was the pivotal one in this case. We think that upon this newly-discovered evidence the court should have granted defendant a new trial. It is objected, however, by the assistant attorney general that the materiality is not such as is likely to change the result, and unless this be the case the new trial should not be granted. Graham & Waterman, in their work on New Trials, upon this subject remark that, "in cases where the new evidence is material and it is doubtful how in connection with the other testimony it might affect the jury, a new trial should always be granted." They then proceed to state the rule: "If it is clear that the new evidence would not change the result, the motion should be denied; but if it be doubtful as to how it would affect the verdict, the motion should be granted. We are aware that a majority of the cases do not go as far as this, but make it incumbent on the moving party to satisfy the court that, if a new trial were granted, the result would probably be different. This, however, is making the court weigh the testimony and pronounce for the jury

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in advance. And it virtually excludes from the benefits of new trials all cases of doubt. We do not believe that in practice the rule can be carried to the rigid extent we would be led to suppose from the language of the authorities." *Graham & Waterman on New Trials*, pages 1043 and 1044, Note 3. *Turnby v. Evans*, 3 Humph. 222; *Mechanics' Fire Ins. Co. v. Nichols*, 1 Harrington, 410; *Robins v. Fowler*, 2 Pike, 133; *Smith v. Matthews*, 6 Miss. 600; *Com. v. Williams*, 2 Ashmead, 69; *Com. v. Murray*, 2 Ashmead, 41; *Glover v. Woolsey*, Dudley's Ga. Reports, 85; *Ables v. Donley*, 8 Texas, 331.

We are of the opinion that the court below should have granted defendant a new trial upon this new evidence, and that there was error in refusing the motion; for which the judgment must be reversed. The judgment is reversed and the cause remanded.

Reversed and remanded.

 JOHN C. RUSSELL v. THE STATE.

1. SELF-DEFENSE — THREATS — EVIDENCE.— To a prosecution for homicide the defendant interposed the plea of self-defense based upon threats made by the deceased to the defendant in person, prior to the homicide, and also upon previous difficulties between the parties. *Held*, that under such plea, the defendant, in order to show whether or not the grounds for fearing death or serious bodily harm were reasonable, was entitled to lay before the jury all circumstances which would go to show the character of the threats, the intention with which they were made, and the grounds of fear on which the defendant acted, and hence evidence of previous affrays, difficulties, attacks and threats are admissible.
2. SAME.— See the opinion *in extenso* for rule laid down defining the relevancy of evidence of previous threats, affrays, etc., and the extent to which such evidence is admissible in a trial for homicide.
3. SAME.— However remote from the main issue in point of time, place, or other circumstances, a fact may be, if relevant, and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of its weight to the jury. See the opinion for discussion of the rule.

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28	88
29	125
11	288
38	642

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4. EVIDENCE.—It being testified by a witness that, immediately preceding the homicide, the defendant and himself increased their speed to avoid the deceased who was in pursuit, it was proposed to prove by the witness that the defendant proposed to increase their speed in order to escape a difficulty with the deceased. *Held*, that the exclusion of this evidence was error.
5. SEPARATION OF JURY—PRACTICE.—The jury in this case returned their verdict in the absence of the defendant, and separated. The court, discovering the absence of the defendant, and having retained possession of the verdict, called the jury together, and had the verdict read in the presence of the defendant. *Held*, that such irregularity of practice constitutes no ground for reversal.
6. SAME—NEW TRIAL.—Separation of the jury will authorize a new trial, only when it appears that the jury have been tampered with, or may have been tampered with.
7. EVIDENCE OF GENERAL CHARACTER of the deceased as a peaceable, inoffensive man, and one not reasonably likely to execute previous threats, is available to the prosecution when the defendant seeks to justify homicide on the ground of threats, whether the defendant has or has not put the general character of the deceased in issue.

APPEAL from the District Court of Williamson. Tried below before the Hon. W. A. BLACKBURN.

The indictment charged the appellant jointly with W. R. Russell, with the murder of John Lawrence, in Williamson county, Texas, on the 14th day of May, 1881. The trial of the appellant at the July term, 1881, of the District Court, resulted in a verdict of manslaughter, with the punishment assessed at two years in the penitentiary.

It was testified on behalf of the State, by three witnesses, that they left the Lawrence Chapel in Williamson county, on the night of the homicide, in company with the deceased. That they had proceeded some distance up the road when they heard hallooming ahead, which deceased declared to proceed from the appellant and his brother William. The deceased left the witnesses, saying that he would ride on and see what they wanted. When the witnesses reached the parties they were fighting,

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knocking and striking each other, the deceased engaged on one side, and the defendant and his brother on the other. The defendant, after several blows had been exchanged, dismounted and caught the bridle of deceased's horse, and stooped towards the ground as though to pick up a stick. The horse jumped towards the defendant. The defendant avoided the horse, and fired four shots, the last taking effect, from which the deceased died. This is substantially the State's narrative of the occurrences at the time of the killing.

For the defense it was testified by a sister of appellant, that, some time before the homicide, the deceased told her that he intended to kill her brothers William and the appellant; that he would rather kill them than any men he had ever seen; which threats she communicated to her brothers as soon as she next saw them. By two of appellant's sisters, two of his brothers and Miss Woods, it was testified that the parties named and the appellant, when returning from the Lawrence Chapel, on the Saturday night preceding the shooting, in a wagon, were overtaken by the deceased on horseback. The deceased cursed and abused the appellant, denounced him as a coward, challenged him to fight, applied grossly approbrious epithets to him, insulted the ladies under his charge, assaulted his team to the great danger of the occupants of the wagon, and, declaring his intention to kill the appellant, put his hand once behind him. William Russell, who had been previously acquitted upon the same indictment, testified that on their return home from the chapel on the night of the killing they were overtaken by the deceased, who commenced a tirade of abuse, and finally assaulted the appellant by striking him. A fist fight ensued between the parties, provoked by the assault of deceased, during the course of which, after the appellant had dismounted, the deceased jumped his horse at the appellant and threw his hand behind him. The appellant

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avoided the horse and opened fire on the deceased. This witness testified also that during a previous dispute between appellant and deceased the latter threw his hand behind him and said that he had "a d—d good six-shooter, and would show it if appellant desired to see it." He testified, also, that when they became aware that they were pursued by the deceased, on the night of the shooting, they increased the speed of their horses to avoid a collision with deceased.

Evidence was also introduced impeaching the reputation of the principal witness for the State for truth and veracity, and to show statements by two witnesses for the State, made elsewhere, which were inconsistent with certain parts of their testimony on the trial. The defense introduced several witnesses who testified to the good character sustained by the appellant as a peaceable and law-abiding man.

Chessher & Belcher and T. P. Hughes, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of manslaughter. There are quite a number of assignments made by counsel for appellant. We will not discuss them *seriatim*, believing that a proper solution of two questions will dispose of most of the errors assigned.

The plea of defendant was self-defense, under threats and former difficulties. The threats were made by deceased against the life of defendant, and were communicated, as well as made by deceased, to him prior to the homicide. Bearing upon the question as to whether the grounds for fearing death or serious bodily harm were *reasonable*; defendant had the right to lay before the jury all circumstances which go to show the character of the

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threats, the intention with which they were made, and the grounds of fear on which the defendant acted. Evidence, therefore, of previous affrays, difficulties, attacks and threats is admissible, being light by which the jurors are to view the acts and intentions of the parties at the time of the homicide. Nor must the evidence stop with proving merely that these affrays, difficulties and attacks had occurred between the parties; the character of these affrays, etc., may be shown. The rules, we think, upon this subject are these: 1st. All that was said or done, or that which occurred at the time of the homicide, tending in the slightest degree to explain the transaction, or the conduct or motives of the parties, is admissible. What was said or done or occurred at the time is relevant to the main fact (the homicide fact). 2d. All facts necessary to be known to explain or introduce a fact *in issue*, or *relevant*, or deemed to be relevant to the issue, or which support or negative a reference suggested by any such fact; or which are necessary to show the relevancy of other facts; or which explain, modify or give character to the main fact or a relevant fact, are admissible.

To present the subject in another light: The main fact was its *res gestæ*, so called, which are the facts and circumstances immediately hovering around and directly connected with it,—occurring at the time and place of the main fact. There are facts which do not form a part of the immediate surrounding facts, but are relevant to the main fact, or to these or some of these immediate facts. To this class belong threats, former difficulties, affrays and attacks; also motive. This enumeration is for illustration, not for the purpose of naming *all* this class of facts. These facts, though not occurring at the time of the homicide, being relevant to the main or some other relevant fact, have their *res gestæ*, so called. The deceased threatened defendant; what were the facts and circumstances attending these threats? They had engaged

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in former difficulties; what were the circumstances which surrounded the difficulties, and which were calculated to give character thereto? And so a *fact which did not occur at the time of the threats or difficulties* may be relevant thereto; and it with its *res gestæ* be drawn into and made a matter of inquiry, and so on until the light grows so dim or uncertain as to render such facts irrelevant. Just here is presented a very nice question indeed, which is this: A fact being relevant, but, owing to its remoteness in point of time, place, or other circumstances, its weight is not clearly appreciable;— must the judge reject or admit the fact? Some authorities hold that the judge may, when thus so remote, fix a limit, though the fact is relevant, and reject the evidence. We think, however, if the fact is relevant the safer and more satisfactory rule is for the judge to admit the evidence and leave the question of its weight to the jury; for so far as the judge deals with the question of its weight he interferes with the legal prerogative of the jury. If, however, these remote facts (though relating to the main fact or a relevant fact) have *no tendency* to explain or elucidate, then the judge, to prevent the intrusion of foreign issues, and to economize the time of the court, should reject them.

But let us return to the reason of the rule which admits these remote facts,— facts which do not properly constitute the *res gestæ* of the main fact, but are clearly admissible to elucidate the main or a relevant fact. Why are they admissible? The answer to our mind is very evident. The issue being: “had the defendant reasonable grounds for fearing death or serious bodily harm?”, to decide this question correctly, the exact relations of the parties to one another, their feelings toward each other and their motives should be known by the jury. These being understood, an act, gesture or word which was spoken or done at the homicide, is viewed and weighed in the light of these remote relevant facts, as well as the im-

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mediate facts. These immediate facts are not only seen in the light of their surroundings, but are weighed and passed upon under the rays emanating from light drawn from facts occurring prior to, and sometimes great distances from the time and place of the homicide. An illustration here, we think, is proper. A. and B. are in an altercation. B. throws his hand behind him to his hip pocket. A. shoots and kills him. The quarrel and act of B. constitute all of the immediate facts attending the killing. The killing under the circumstances would be thought, by an honest jury, a wanton and unprovoked murder. That to shoot down a fellow man because he merely put his hand behind him, or in his pocket, was simply an outrage upon humanity as well as law. But, suppose that B. had been breathing out threats against the life of A.,—had been the aggressor in a number of difficulties with him, in which he had shown himself a violent and dangerous man, and so on,—this apparent harmless movement of the hand, viewed in the light of these facts (though not occurring at the time), assumes quite a different shape and proportions. It is not that accidental or insignificant thing as was supposed when seen in the light of the facts which immediately attended it; but may be pregnant not only with apparent but actual danger to the life of A. The admissibility of a fact is quite a different thing from its sufficiency. We are passing upon its competency, not its weight or conclusiveness,—this is the work of the jury.

These remote facts, to wit, the threats, difficulties and affrays, being of so much importance, then their character should be thoroughly understood by the jury. If they were not serious the apprehensions of defendant would not be so well founded; but if they were grave his fears would be found reasonable; hence, to determine the gravity, all of the facts — the threats, the manner, the pressure, the occasion — in fact, every thing done by the parties,

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or any other person, tending to show the character of these threats, difficulties and affrays, should be presented to the jury. This was done in this case, as will appear by a number of bills of exceptions.

It appears from the statement of facts that, just before the killing, deceased overtook defendant, and that he cursed and abused defendant; dared him to come back, stated that he would maul hell out of him, etc. This is the account given by Wm. Russell, a brother of defendant. The deceased's account is, that the Russell boys, when he overtook them, cursed him. Carter, a witness for the State, heard two "voices cursing each other." When Carter and others overtook deceased, he had just separated with the Russell boys, and said they were down there in the road cursing him, and that he was going down after them, and loped off. Wm. Russell states that when they heard deceased come running after them that they increased their speed to a gallop towards home. Defendant proposed to prove by Wm. Russell that he, defendant, then said, "I heard John Lawrence coming; let us gallop up, I don't want to have any difficulty with him." This was objected to by the State, and the objections were sustained by the court, and defendant reserved his bill. This was error. This evidence was very evidently admissible, There could have been but one objection to it, and that is that it may have been manufactured by the defendant, and made self-serving declarations. This all may be true, but if all evidence which *may have been manufactured for the occasion* is to be rejected, we fear that the limits would be very narrow indeed. The court below admitted the fact that they increased their speed to a gallop. This was an act, and if the act was evidence, certainly what was said at the time in reference to the act was also admissible. These facts were so closely connected with other acts and the killing, in point of time, as to constitute *res gestæ*, so called. It is not probable that defend-

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ant knew that deceased would overtake him and that he would kill him, and that to justify himself he concocted this evidence. Time is of vital importance as bearing upon the question as to whether the declarations be self-serving or spontaneous. But if spontaneous (and this is to be determined by all of the facts), it is admissible, though there may have been opportunity to manufacture the facts sought to be introduced.

The separation of the jury after they had returned their verdict (the defendant not being present) is no such irregularity as will authorize a reversal of the judgment. The jury returned their verdict, which was received in the absence of defendant, and they separated, when the court discovered that defendant was absent; the jury was called together (the judge keeping the verdict in his possession all the while), and the verdict was read in the presence of defendant. There can be but two reasons why a verdict should be set aside when a separation of the jury has taken place. 1st. That the jury have been tampered with, or, 2d, might have been tampered with. Here the record precludes any such supposition. *Graham & Waterman on New Trials*, vol. 2, p. 550.

The defendant seeking to justify on the grounds of threats, the State had the right to prove that the general character of deceased was that of an inoffensive man, and that he was not such a person as might reasonably be expected to execute the threats. This the State could prove, where defendant makes this defense, notwithstanding defendant introduced no evidence touching the character of deceased. Penal Code, art. 612.

The other errors complained of will not arise on another trial, and will not be discussed here. For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

Statement of the case.

JOSEPH ST. CLAIR v. THE STATE.

1. **PERJURY—INDICTMENT.**—Objections to an indictment for perjury before a grand jury were: 1, because it did not show by direct affirmative allegation that the District Court was in session at the time of the alleged offense; 2, it did not show the organization of the grand jury; 3, it did not show the appointment of A. as foreman of the grand jury; 4, it did not allege that the said grand jury was in session when the oath was administered by A., nor when the alleged statements were made. *Held*, that the indictment, notwithstanding, is sufficient to charge the offense.
2. **CHARGE OF THE COURT—PRACTICE.**—The defendant in this case interposed no objection to the charge complained of when it was given, nor did he point out or specify in his motion for new trial his ground of objection. That the court erred in its charge is an allegation in a motion for new trial too general to authorize review by this court, unless the error be fundamental or injury apparent.
3. **PRACTICE.**—The records of the court were competent evidence to show that the District Court was in session and the grand jury organized when the perjury was committed.

APPEAL from the District Court of Lampasas. Tried below before the Hon. W. A. BLACKBURN.

The indictment charged the defendant with perjury before the grand jury of Lampasas county, at the November term, 1879, of the District Court of that county. He was convicted at the May term, 1881, and awarded a five years' term in the penitentiary.

The State introduced the clerk of the District Court, who identified the minutes of the November term, 1879, and then the minutes showing that the District Court was in session, and the grand jury duly organized with H. S. Arnold as foreman. Arnold was then introduced by the State, and testified that the defendant was before the grand jury, of which the witness was foreman at the time charged; that, as foreman, he administered to the defendant the oath required by statute; and that the defendant, responding to inquiries concerning theft of

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cattle by one Allen Lunsford, then under consideration, said, as written down by the witness, as follows: "Joseph St. Clair testifies to having bought a beef on the 14th of November, 1879, from Allen Lunsford, branded J. O., about four years old. Wyatt and Allen Lunsford are both implicated in this killing. Said beef killed in the night on the prairie — said beef a stray." "H. S. Arnold, Foreman Grand Jury, November term, 1879." This memorandum the witness identified as that written by him at the time, and as being the statement made by defendant.

Another grand juror of the November term, 1879, testified to the same effect. Allen Lunsford testified that he did not sell the defendant a four year old beef branded J. O. on November 14, 1879, nor at any other time; that he, the witness, was the only Allen Lunsford in Lampasas county.

J. C. Matthews testified for the State that he appeared as counsel for Allen Lunsford at the May term, 1880, of the District Court, and that in that trial the defendant as a witness for the State testified that he did not, on November 14, 1879, buy a four year old beef branded T. O. of Allen Lunsford.

Two other members of the grand jury testified to the fact that the defendant was before the grand jury and testified about cattle-theft by the Lunsfords, and that he was sober when he testified; but neither of them remembered the substance of his testimony.

Townes & Burleson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of perjury, charged to have been committed before the grand jury of Lampasas county. The defendant moved the court below to quash the indictment, for the following reason: "Be-

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cause the same charges no offense against the State of Texas."

This exception does not point out the supposed defects in the indictment; but this is done in the very able brief of counsel for defendant. The grounds relied upon to sustain the motion are these:

"1st. Because it, the indictment, does not show by direct affirmative allegation that the District Court of Lampasas county was in session on the 19th day of November, A. D. 1879, the date of the alleged offense.

"2d. Because it does not show the organization of the grand jury before whom the perjury is charged to have taken place.

"3d. It does not show the appointment of H. S. Arnold as foreman of the grand jury.

"4th. It does not allege that the said grand jury was in session when the oath was administered by said Arnold; nor when the alleged statements were made."

The objections may be condensed into one, for they all rest upon the same foundation, which is, that the constitution, organization or lawful existence of the tribunal before which the oath was taken must be clearly and affirmatively set out in the indictment. In support of this proposition a great many opinions, both English and American, can be relied upon. The English authorities are mostly, if not entirely, anterior to 23 Geo. 2, Ch. 11, but in this country quite a number may be found subsequent to the passage of that act, which was in 1750. Is the statute of 23 Geo. 2 binding, as common law, upon the courts of this State? Upon this question Mr. Bishop observes: "The former statute is of a date too recent to be a part of our common law by force of the ordinary rules which govern such questions. But sometimes a statute so highly remedial, passed during the colonial period, was, especially when it might be deemed in some measure declaratory of the true rule, accepted by our courts as furnishing the rule for their future guidance."

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Again, he further, we think, very justly remarks: "Not unfrequently statutes were passed to remove objections which had no real foundation in the law as *correctly* construed, but only in some corrupt general or even local practice." This great writer and philosopher maintains that the rules contained in 23 Geo. 2 were, prior to this act, the true doctrine, and that this statute merely declares that to be law which was in fact (not practice) the law; and that the provisions of that statute, not by virtue of the act, are binding upon the courts of this country as common law. This State has placed herself in line with others of these United States, and holds the doctrine enunciated by Mr. Bishop. This is no longer an open question in this State, for it has been discussed at great length, and we hope put to rest. Bishop Cr. P. vol. 2, secs. 901, 902, 903 and 904; 50 Mass. 219; 6 Texas Ct. App. 184; 7 Texas Ct. App. 375; 9 Texas Ct. App. 171. Notwithstanding the very able brief and argument of counsel for defendant, we are constrained to hold the indictment good.

The counsel for defendant urges a reversal because of a paragraph in the charge. There was no objection taken to the charge at the time, nor did the motion for a new trial point out or specify the grounds of objection. To allege in the motion that the court erred in the charge is too uncertain, too vague; in fact, it furnishes the court with no information as to the error, in order that the court may redress the injury if there be any. If the court misdirects the jury, defendant should except, or point out the wrong in his motion for a new trial, thus giving the lower court the opportunity to correct the error, or redress the wrong by a new trial. And unless this course be pursued, we will not reverse the judgment for such errors, provided the error is not fundamental, or the injury not evident.

The evidence, we think, clearly supports the verdict. The action of the court in admitting the records of the

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court to prove that the District Court was in session, and that the grand jury was organized, was highly proper. There could have been but one objection to this evidence, and that was the want of an allegation in the indictment to support this proof; hence the decision of the first question settles this. We have very carefully examined this record, and the very able brief of counsel for defendant, but have found no such error as will warrant a reversal of the judgment. The judgment is affirmed.

Affirmed.

T. ELSCHLEP v. THE STATE.

RAPE.—INDICTMENT for rape charged an assault upon the female with intent to ravish and carnally know her, and alleged that the accused obtained carnal knowledge of her without her consent and against her will. *Held*, not a good indictment to charge a rape by force, because it neither alleges that the accused obtained the carnal knowledge by force, nor that he ravished the female. See the opinion in full.

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APPEAL from the District Court of Guadalupe. Tried below before the Hon. E. LEWIS.

The material allegations of the indictment are embodied in the opinion. The verdict of conviction assessed the punishment at a term of eighteen years in the penitentiary.

Goodrich & Neal, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of rape.

The charging part of the indictment is as follows: "That Theodore Elschlep, late of said county, on the fifth day of February, in the year of our Lord eighteen hun-

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dred and eighty, with force and arms in the county aforesaid, did then and there wilfully, unlawfully, fraudulently and feloniously in and upon the person of Anna Schmidt, a female child, did make an assault with the unlawful and felonious intent on the part of him, the said Theodore Elschlep, to forcibly ravish and carnally to know her the said Anna Schmidt, without the consent and against the will of her the said Anna Schmidt, the said Theodore Elschlep being then and there an adult male person; and so the grand jurors aforesaid, on their oaths aforesaid, do say that at the time and at the place, and in the manner and by the means aforesaid, he the said Theodore Elschlep did wilfully and unlawfully and feloniously have and obtain carnal knowledge of the said Anna Schmidt, without then and there the consent of the said Anna Schmidt," etc.

The defendant by his counsel excepted to the sufficiency of this indictment upon the ground that "it does not allege that the carnal knowledge was obtained by force, threats or fraud." It is true that the indictment fails to allege either of these means in the language of the statute; but if words of similar import are used, this will suffice. Has this been done in this indictment? A charge that defendant did ravish is equal to an allegation that the rape was effected by force and against the consent of the female; hence, if this indictment alleges that the defendant did ravish Anna Schmidt, it would be good, so far as the means used to effect the rape is concerned.

But does this indictment contain this allegation. Evidently it does not. It is true that there is an averment that the *assault* was made *with intent* to ravish, but it is no where charged that defendant *did* ravish the prosecutrix. It is urged, however, that, as the indictment charges that defendant assaulted Anna Schmidt with intent to ravish her, and as it then proceeds to charge the rape by alleging that "at the time and at the place and in the

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manner and by the means aforesaid, he the said Theodore Elschlep did have and obtain carnal knowledge of the said Anna Schmidt," that this portion of the indictment which seeks to charge the rape is aided by every allegation contained in that which charges the assault. Concede this to be true, still the same trouble meets us at the threshold; which is that that part of the indictment which *charges the assault* fails utterly to charge that defendant *ravished*; but that he made an assault *with intent* to ravish.

Most clearly, a charge that a person attempted or intended to do a thing is not an affirmative allegation that he accomplished his intended purpose. The "*manner and means aforesaid*" are supported not by an accomplished fact, but by an intended act. The defendant assaulted the girl with intent to ravish, that is, with intent to have carnal knowledge *by force* (the word *ravish* being equal to and of the same import with having carnal knowledge *by force*); hence, that part of the indictment which charges the assault alleges, in substance, that the assault was made with intent to have carnal knowledge *by force*. There was an intended means (which was *force*), but it is not charged anywhere that either this or any other means was actually used; therefore, to hold this indictment good, the intention to resort to force to accomplish the rape must be held equal to an actual resort to and use of force. The assault in this case fails to reach the force,—that force by which the rape was effected. The force was only in the mind,—intended, not applied,—not made the means by which the carnal knowledge was obtained.

We are, therefore, of the opinion that the exceptions to the indictment were well taken and should have been sustained. The judgment is, therefore, reversed and the case dismissed.

Reversed and dismissed.

Statement of the case.

WILLIAM WINN v. THE STATE.

1. CHARGE OF THE COURT — PRACTICE. — It is incumbent upon the defendant in a misdemeanor case to except to erroneous charges given, and to the refusal of the court to give instructions asked, in order to subject such questions to review by this court.
2. EVIDENCE — NEW TRIAL. — See evidence held insufficient to sustain a conviction; wherefore a new trial should have been awarded.

APPEAL from the County Court of Hopkins. Tried below before the Hon. J. K. MILAM, County Judge.

The indictment charged the theft of eight gallons of syrup, of the value of five dollars, the property of B. M. Camp. The appellant was convicted and his punishment was assessed at a fine of five dollars, and one hour's confinement in the county jail.

B. M. Camp testified for the State that, on or about the 18th day of December, 1880, the appellant came to him on his farm in Hopkins county and asked him for a five gallon keg of syrup with which to pay Doctor Gilbert a medical bill, agreeing to pay witness in labor. He had made the same request of witness two or three times before, but was told on each occasion that the witness would not pay him until the labor was performed. Subsequently the defendant approached the witness when he was quite busy, and asked for an order for a five gallon keg of the syrup. The witness told him to go off, that he had no business with an order then. A short time later the witness missed an eight gallon keg of syrup, and meeting the defendant in Sulphur Springs, asked him about it. The defendant acknowledged that he took it. The witness asked why he took an eight instead of a five gallon keg, as asked for. He replied that as there was plenty of syrup there, he thought he would take the eight gallons, and pay for it in labor. An account was running between defendant and witness, of which the

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witness had paid the larger part, but no ultimate settlement had been concluded.

Doctor Gilbert testified that the defendant delivered to him what he took to be a five gallon keg of syrup, but which he subsequently ascertained to be an eight gallon keg.

B. W. Foster, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was convicted of the theft of eight gallons of syrup,— a misdemeanor.

The charge of the court was erroneous from its inception to its close. That which was asked by counsel for defendant and refused by the court was *the charge* demanded by the case made by the evidence. No objection was made to the charge given, nor did defendant except to the action of the court in refusing to give the charges requested by him. This being a misdemeanor, it was incumbent on defendant to except in both instances, and reserve his bills. *Hobbs v. State*, 7 Texas Ct. App. 117, and authorities there cited.

The verdict in this case is not supported by the evidence. The facts not only fail to show a fraudulent intent, but most evidently negative such intent. (The Reporter will insert the evidence.)

The evidence being insufficient to support the verdict, the court erred in not awarding a new trial, for which the judgment is reversed and the cause remanded.

Reversed and remanded.

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F. M. LAWRENCE *v.* THE STATE.

1. PRACTICE.—A requested instruction to the jury was refused by the trial judge because it was not filed before it was presented. *Held*, no reason at all.
2. THEFT—CLAIM OF RIGHT.—In a trial for theft the evidence showed that the defendant took the property openly and in the belief that he had a right to do so. *Held*, error to refuse an instruction for acquittal in case the jury so found the fact; and error to refuse a new trial.
3. PRACTICE.—Having no right of appeal in a criminal cause, the State has no right to a bill of exceptions.

APPEAL from the County Court of Rains. Tried below before the Hon. E. P. KEARBY, County Judge.

The case is fully and clearly stated in the opinion.

C. H. Yoakum, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The defendant in this case was charged by information with the theft of twelve bushels of corn, of the value of \$6, the property of John Morehead, but, when stolen, in the possession and custody of F. M. Hudson. His trial resulted in his conviction, with his punishment assessed by the jury at a fine of \$6, and confinement of five minutes in the county jail.

The evidence disclosed that the State's witnesses, Hudson and Morehead, had rented sixty acres of land from the defendant under a contract to cultivate it jointly, forty acres in cotton and twenty in corn; for which they were to pay a rental of one-third of the corn and one-fourth of the cotton realized. That pending the maturity of the crop, the defendant had furnished the witnesses supplies of corn and meat. That before the maturity of the crop, the witness Hudson, by agreement with Morehead, assumed exclusive management and cultiva-

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tion of the cotton land, leaving to the latter the exclusive management and cultivation of the corn land. That when the corn matured, the witness Morehead gathered four loads, deposited one load in the corn pens of the defendant, and of the balance deposited that charged to have been stolen in the pens of Morehead. That the defendant, claiming a balance due on advances, drove his wagon to Morehead's pens, and took the corn, *sans ceremonie*, but asserting his right to it as due him on rents and for advancements.

Upon this state of facts, the defendant's counsel requested the court to charge as follows: "Gentlemen of the jury: If you believe from the testimony that the defendant claimed that the tenant that raised the corn (that defendant is charged with stealing) was due him rent or advances, and that defendant honestly believed that he was entitled to possession of said corn to secure him in the rent, and that under his claim he took possession of the corn, he would not be guilty of theft." This charge was indorsed by the judge: "Refused; presented by counsel for defendant without being filed. E. P. Kearby, County Judge." "Filed Sept. 6, 1881. Thos. M. Allred, Clerk."

In the first instance, the refusal of this charge was error, patent and palpable. The charge asked, while not phenomenally artistic, was responsive to the case as made by the evidence, and announced a well-settled principle of law. It involved the very essence of the controversy as made by the evidence both for the State and for the defense, and its refusal by the court could not have resulted otherwise than to the defendant's prejudice.

But his honor's reason for refusing the charge, as stated in his note of explanation, announces to us a rule of law and practice at once novel and anomalous. How a defendant is to get requested charges filed and made a part of the record in a case before they have been presented to the court and either given or refused, is, we confess, a ques-

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tion of profound difficulty to us. At all events the reason assigned is no reason at all, and affords no excuse whatever for the unauthorized action of the court.

The refusal of the charge asked was error on the part of the court. Equally were the subsequent proceedings on the trial objectionable as finding no sanction in law. After the court had refused the charge asked, because, as stated, it had not been previously filed, and the defendant had asked that it be then filed and made a part of the record, with a view doubtless, of eliciting revision by this court, the county attorney objected to the filing of the same for the purpose named, and his objection being overruled actually reserved a bill of exceptions, which was allowed and is brought up in the record. There is no rule of law authorizing such proceeding. The defendant was entitled to a complete transcript of the record, showing *all* the proceedings in the case, of which the request for and refusal of the charge is always and was in this case a most important part and parcel. The State has no appeal from any proceeding of the court in criminal cases, and the granting of this bill of exceptions and its incorporation in the record amounted to no more than burdening the record with irrelevant matter.

Again: though this court will hesitate to interfere with the functions of the jury, when it appears that the State, upon its theory of the case, presented a sufficiency of evidence to sustain a conviction, yet, when a total and absolute want of such evidence is manifest, we will unhesitatingly reverse. And such is the character of the evidence in this case. It is entirely insufficient to sustain the conviction.

Because of error in the refusal of the charge asked, to which the defendant excepted at the time, and brings before this court on proper bill, and because of the inadequacy of the evidence to support the verdict, the judgment is reversed and the cause remanded.

Reversed and remanded.

Argument for the appellants.

W. ROBINSON AND OTHERS v. THE STATE.

1. BAIL BOND described the offense as an "assault with intent to rob." It is urged that this expression designates no offense under the law of this State, because not tantamount to "assault with intent to commit the offense of robbery." But *held* that the designation used in the bond is correct.
2. INTERPRETATION OF THE CODES.—Article 8 of the Revised Penal Code amends the corresponding article of the original Code, and permits an act or omission to be "made a penal offense" without being "expressly defined."
3. ROBBERY AND ASSAULT WITH INTENT TO ROB are offenses specifically known to and defined by the Penal Code.
4. PRACTICE IN THE COURT OF APPEALS.—If the final judgment on a forfeited bail bond be erroneous by reason of repugnancy between it and the judgment *nisi*, the error could be corrected on appeal, without remanding the case to the court below.

APPEAL from the District Court of Burleson. Tried below before the Hon. I. B. McFARLAND.

The opinion sufficiently indicates the matters involved in the rulings.

E. L. Antony, for the appellants. The court erred in overruling the objection of defendants to the sufficiency of the bail bond herein and their motion to quash and dismiss; because the bail bond does not distinctly name any offense known to the laws of the State of Texas.

The bail bond must not only name the offense of which the defendant is accused, but must also name an offense known to the law.

Bail bond names "assault with intent to rob." There is no such offense known to the law of Texas. The words "to rob," not being known to law, express no legal idea. They are like "to kill" in "assault with intent to kill," and do not mean anything. There is mentioned in the law what purports to be an offense of "assaulting another with the intent to commit the offense of

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robbery;" but when we examine to see what the "offense of robbery" is, we find that there is no such offense known to the law by distinctive name of "robbery," but that "robbery" is but the name or title of a chapter in our Penal Code which treats of two offenses, and is but a generic name for a class of offenses, and the word "robbery" is not used in any statute defining an offense. So that, sifting it down, there is no offense known to the law named in the bail bond, unless it be a simple assault, which is below the jurisdiction of the District Court; and this makes the bond a nullity.

If there is no distinctive name given by statute to a defined offense, a reasonably certain description of the offense must be given; or, if a generic term be used, a reasonably certain description of the ingredients of the offense must also be stated, to tell what is meant. If this be true, there is no offense known to the law named in this bond, and it is therefore defective and void. Rev. Code Crim. Proc. art. 288, subdiv. 3; Rev. Penal Code, arts. 504, 722, 723; 4 Texas, 417; 6 Texas, 425; 7 Texas, 547; 8 Texas, 173; 19 Texas, 293; 20 Texas, 493; Id. 497; Id. 505; 25 Texas, 171; 26 Texas, 111; 27 Texas, 610; 30 Texas, 163; Id. 353; 31 Texas, 168; Id. 205; 32 Texas, 368; Id. 600; Id. 652; 33 Texas, 179; 34 Texas, 147; 43 Texas, 549; Id. 602; 44 Texas, 112; Id. 274; 1 Texas Ct. App. 58; Id. 640; 2 Texas Ct. App. 7; 3 Texas Ct. App. 522; Id. 681; 4 Texas Ct. App. 435; Id. 554, 557; Id. 580; 6 Texas Ct. App. 460; 7 Texas Ct. App. 28; Id. 55; 8 Texas Ct. App. 671; 9 Texas Ct. App. 465.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. As stated both in the indictment and bail bond, the offense charged is alleged to be "an assault with intent to rob." It is insisted that this charges no offense against the laws of the State, and hence the judg-

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ment final on the forfeited bail bond is and was a nullity, and should be so declared by this court, and the prosecution be dismissed.

Two propositions are urged with great force and plausibility in the able brief of counsel for appellant. 1. That the offense of robbery is not defined in our Code *eo nomine*. 2. But should it be held otherwise, then "assault with intent to rob" is not synonymous with the statutory offense denominated and known in the Code as "an assault with intent to commit the offense of robbery."

It is expressly provided by statute that, "in order that the system of penal laws in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission unless the same is made a penal offense and a penalty is affixed thereto by the written law of this State." Penal Code, art. 3. It is to be noted that there is a change in the language of this article and that as formerly used in art. 3, Penal Code of 1856. Under this latter article, the language was "no person shall be punished for any act or omission as a penal offense *unless the same be expressly defined* and the penalty affixed by the written law of this State." Pas. Dig. art. 1605. Now it is not necessary that the act be expressly defined if it has *been made a penal offense* by the Code. Clark's Crim. Law, p. 2, and note.

The offense of robbery, as known at common law, is as clearly defined in the following language as though it had been stated that the language was intended as the definition of robbery, viz.: "If any person by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than ten

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years." Penal Code, art. 722. But, over and beyond this, if it were necessary to do so we would be warranted in urging as an additional argument that this is a definition of robbery "*eo nomine*, because we find in the marginal note to art. 722 the expression "Robbery defined and punished;" showing what our codifiers thought was a proper construction of the statute, and this marginal note of theirs, declaring art. 722 to be a definition of robbery, was adopted as part and parcel of that article when the Revised Codes were adopted by the Legislature. So that we have not only the offense defined but also the declaration in the marginal note that the offense thus defined is "robbery." Not only so, but in numerous other statutes this offense is denominated and referred to as robbery; as, for instance, in "assault with intent to commit the offense of robbery" (Penal Code, art. 504), and in murder when it is committed in the perpetration or attempt at the perpetration of robbery (Penal Code, art. 606), and in other statutes wherein this offense is referred to solely by its name.

Our conclusion is that there is such an offense known to our law as robbery, and which has not only *been made penal* but which has also been defined in art. 722, *supra*, and so declared in the Revised Statutes, which are now the law of the land.

But, 2, it is said there is no such offense as "an assault with intent to rob," and consequently no offense is named in the forfeited bail bond.

The statute reads: "If any person shall assault another with intent to commit the offense of robbery he shall be punished by confinement in the penitentiary not less than two nor more than ten years." Penal Code, art. 504. This article is found in the chapter which treats "of assaults with intent to commit some other offense," and in the marginal note to this article it is called by our codifiers assault "with intent to rob." "Assault with intent

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to rob" is what this offense was called at common law. Arch. Crim. Prac. & Pleading [8th Ed.], top p. 1311, side page 425. To our minds the expression "assault with intent to rob" is the proper one to designate the offense. To charge it as "an assault with intent to commit the offense of robbery" would be to charge a conclusion of law rather than the facts constituting an offense. Besides this, the expression "an assault with intent to rob" necessarily comprehends and embraces all that is meant by an assault with intent to commit the offense of robbery. And rob and robbery are synonymous in meaning. (See Webster's Dictionary.) There is no analogy between the charge in this case and a charge of "an assault with intent to kill," which latter has been held time and again to state no offense. *Sheffield v. State*, 1 Texas Ct. App. 640; *Lockwood v. State*, *id.* 749; *Wilson v. State*, 25 Texas, 171.

There is complaint made that the judgment as rendered is both a joint and several one, and consequently erroneous. The judgment *nisi* might perhaps be held obnoxious to such objection, but not so the judgment final; and if such error had been made to appear in the judgment final, this would not have necessitated a reversal, but this court would have reformed and corrected the judgment as the law and nature of the case required. Code Crim. Proc. art. 869. This we find no occasion to do.

We have been unable to see any such error in the record as demands a reversal of the judgment, and it is therefore affirmed.

Affirmed.

COURT OF APPEALS OF TEXAS.

GALVESTON TERM, 1882.

CHES. THOMAS *v.* THE STATE.

11	315
35	187

1. **TREATS.**— That the deceased had made threats against the life of the defendant will not avail as a defense to a prosecution for murder, in the absence of evidence showing hostile demonstrations by the deceased at the time of the killing.
2. **DYING DECLARATIONS — PRACTICE.**— While it is true that statements of the deceased concerning previous difficulties with the defendant are not admissible as part of his dying declarations, yet it is the duty of the defense to object thereto when offered. Otherwise this court will not interfere.
3. **EVIDENCE.**— See evidence held sufficient to sustain a conviction for murder in the first degree.

APPEAL from the District Court of Anderson. Tried below before the Hon. P. F. EDWARDS.

The death penalty was assessed in this case for the murder of Houston McMeans, in Anderson county, on the 6th day of March, 1881.

The testimony of the various witnesses for the prosecution concerning the occurrences at the time of the killing is identical. The defendant and the deceased, according to them, when first seen before the shooting, were standing together before a business house, conversing, the deceased with both hands in his pockets and the defendant with one hand on the lapel of his coat and the other resting on a post. The subject of their conversation was unknown to any of the witnesses, but it did not appear an excited one, and no one thought of a difficulty. After talking a short time, the deceased started up the street.

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After he had walked some six or eight feet, the defendant drew a pistol and fired, striking the deceased in the back, and following and firing on him until he fell. No one of the witnesses saw the deceased make any demonstrations, or heard him use any threatening language. These witnesses for the State were several in number, and occupied positions on the street fifteen or twenty paces from the parties when the shooting occurred.

About the substance of the dying declarations of the deceased was that, on the night preceding the shooting, the defendant attacked him; that he refused to enter into a quarrel and left the defendant; that next day he requested defendant to go with him and assist in hitching up a drag; that defendant refused; that he then turned to leave and was shot in the back by the defendant, for nothing.

Several witnesses for the defense testified that on different occasions prior to the killing they had heard the deceased say that the defendant had sworn a lie on him in court, and that he intended to "cut his bowels out." On at least one of these occasions he exhibited a knife. One or two witnesses testified that they had told the defendant of these threats; others had not.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. As serious as is the nature of the case here presented, there really appears nothing, after a most careful consideration of the record, which requires even a discussion at our hands. On a trial under an indictment charging him with the murder of one Houston McMeans, in the county of Anderson, on the 6th day of March, 1881, appellant was found guilty of murder of the first degree, and his punishment affixed at death by hanging.

No objection was raised to the indictment. No objec-

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tion is urged to the charge of the court, which was an able and eminently fair exposition of the law, and in its submission of the law of self-defense went even farther in behalf of defendant than was called for by the evidence. An effort was made by defendant to show threats against himself by deceased, but there is not a single tittle of evidence tending to show that deceased had made or was making any hostile demonstrations at the time of the shooting. On the contrary, after to all appearances an earnest but friendly interview, when he turned to leave defendant the latter drew his pistol and shot him in the back, and, not content with that, followed him up as he ran and continued firing upon him until he fell. To all appearances a more cruel, wanton and outrageous assassination was never perpetrated, and the jury were most clearly warranted in the verdict which they have rendered, under the law and facts of the case.

It is true that a portion of the dying declarations of deceased, so far as they referred to prior difficulties between the parties, should and would have been excluded had objections been made. But they appear to have been introduced without objection from defendant, and in any event could scarcely have prejudiced his case in view of the other overwhelming legitimate evidences of his guilt. "The dying declarations of a party are only admissible in evidence on a trial of a homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations." 1 Greenl. Evid. § 156; *Krebs v. State*, 3 Texas Ct. App. 348. As stated above, no objection was urged to the introduction of the declarations, and, having consented to the introduction, defendant is precluded from complaining.

We are unable to see any reason why we should interfere with the verdict and judgment rendered in this case, and they are therefore in all things affirmed.

Affirmed.

11 318
32 391

PETER WOOD v. THE STATE.

1. EVIDENCE—TIME.—Information charged the commission of the offense on April 30, 1881. The trial was on August 3, 1881. The evidence stated the day of the offense as "April 30." *Held*, sufficient as to time, though the year was not expressly in proof.
2. INFORMATION against one party for "loud and vociferous talking and assault" upon another may be based upon an affidavit which charged both the accused and the other with loud and vociferous talking and with assault upon each other.
3. DISTURBING RELIGIOUS WORSHIP—EVIDENCE.—A prosecution for disturbing a congregation assembled for religious worship will not be sustained by proof that the congregation, though disturbed, was assembled exclusively for business purposes, even though the proceedings were opened with religious exercises.
4. SAME.—See the opinion *in extenso* for evidence held insufficient to sustain a conviction, even had the information charged the proper offense.

APPEAL from the County Court of Houston. Tried below before the Hon. W. B. WALL, County Judge.

The opinion discloses the case.

Burnett & Nicks, for the appellants.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant, Peter Wood, though not an ordained minister of the gospel, was a regular licensed exhorter in the Union Prairie colored school-house and church of Houston county, Texas. One Rev. Joe Jolley was the pastor in charge of said church. From some cause not developed in the record, these two holy men unfortunately got at loggerheads and, as appears, indulged in remarks about each other, which, however true they might have been, were not at all flattering to their respective characters. At all events appellant understood that the Rev. pastor had so conducted himself with regard to him.

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On the 30th of April, 1881, a conference was held in said church and, as explained by the pastor in his testimony on the trial, "it was a business meeting, and among other things to decide differences among the brethren. . . . The meeting was opened by singing and praying, and I read a chapter in the Bible and made a few remarks, when the meeting was opened for business." Amongst other matters that had been submitted to the conference for adjudication and settlement was the difficulty above mentioned. Being a party interested, the pastor, who was *ex officio* presiding officer, very considerably and very properly excused himself, and George Mann was elected Moderator. A motion was then made and carried that Peter Wood be allowed to make a statement of the nature and cause of the difficulty. Defendant arose and proceeded to do so. Just about this time, parson Jolley says he had given brother Giles Walker a chew of tobacco, and was putting the tobacco back into his pocket. "Defendant, after he got up, laid his left hand upon the Bible, which was open, and said the Bible said, if my brother told a lie it was his duty to tell him of it; and that brother Jolley had as good as swore lies on him." At this Jolley jumped up, his right hand still in his pocket, where he had put his tobacco, and as he got up said "he would take the lie off no man;" and here and then, as one of the witnesses graphically expresses it, "the rumpus begun; there was considerable disturbance." George Mann says "myself and others got between them, and finally squelched the difficulty; don't know that any licks were passed, but the meeting was disturbed. The conference silenced both parties."

In addition to his ecclesiastical punishment of being thus silenced as an exhorter, defendant has also been held answerable to the temporal or secular powers of the State, was prosecuted for disturbance of religious worship, tried and found guilty upon the facts as above stated, and con-

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demned by the verdict and judgment rendered in the lower court to pay the sum of \$25 fine, and all costs of the proceeding. From this judgment he appeals here, and asks that the judgment be reversed.

The gravamen of the offense, as stated in the information, is "that Peter Wood, in the county of Houston and State of Texas, on the thirtieth day of April, in the year of our Lord one thousand eight hundred and eighty-one, did wilfully disturb a congregation assembled for religious worship, and conducting themselves in a lawful manner, by loud and vociferous talking and by assaulting Joe Jolley, then and there against the peace and dignity of the State."

Several interesting questions are discussed in the able brief of counsel for appellant.

1. That the time of the commission of the offense was not proven. This proposition is not sustained by the record. The date of the offense was stated to be 30th April, 1881; the trial was the 3d of August, 1881, and the witnesses say the disturbance occurred on the 30th April. Parson Jolley says "on the 30th April we had a conference of the church." It is true he does not say in *totidem verbis* that it was April, 1881. But no other meaning can be ascribed to his language, and the objection is too fine and technical, if not hypercritical.

2. That there is a fatal variance between the affidavit or complaint and the information. The complaint charged that the offense was committed by appellant and one Joe Jolley, "by loud and vociferous talking and by assaulting each other." As seen above, the information charged that appellant alone committed the offense "by loud and vociferous talking and by assaulting Joe Jolley." We see no inconsistency between the two charges. If both parties really indulged in loud and vociferous talking and assaulting each other, then each one separately committed his share of it and could be charged with it separately in

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a separate information based upon the complaint which charged both jointly. This is just one of those exceptional cases wherein the joint charge comprehends and may be divided into two separate charges without varying the nature of the original charge as stated in the complaint.

3. It is claimed that the evidence does not support the allegations in the information nor the verdict and judgment. The position insisted upon is, that if a disturbance was in fact created by defendant, then the congregation disturbed was not one assembled for religious worship, but a meeting or conference of the church, convened solely for the transaction of business matters. The statute, Penal Code, art. 180, protects and is only intended to protect any congregation or part of a congregation *assembled for religious* worship. Now there is no dispute as to the objects and purposes of the meeting in question; all the witnesses agree that it was a conference for business,—called expressly for that purpose,—and the congregation had assembled alone for that purpose. Religious worship, on the other hand, is where the congregation have assembled for the purpose of performing acts of adoration to the Supreme Being, or to perform religious services in the recognition of God as an object of worship, love and obedience, according to the rites and services of any system of faith entertained with respect to the Deity. If it was in truth a business meeting, then the fact that parson Jolley *ex mero motu* opened the meeting with singing and prayer, and read verses from the Bible, and “made a few remarks,” would not and should not be permitted to change the object for which the congregation had really assembled. Despite these badges of religious worship, the primal object of the assembly was business and not worship, and we conceive the statute cannot be strained to cover such congregations, however desirable it might be to have religious orders protected from worldly disturb-

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ances in the transaction of their business affairs. But when these worldly matters invade the sacred precincts of the church, and she assumes the right and prerogative of their investigation, she must not expect, where moral influences and religious restraints fail, or are inadequate to protect her from the wrongs and outrages of her own members, to exact from the law any other or further protection than that accorded to other business assemblies or secular associations. We are clearly of opinion that if the difficulty in this instance was wilfully created by Peter Wood, and the congregation was disturbed thereby, the disturbance does not come within the purview of, nor render him liable under the statute, because the congregation was not assembled for religious worship. A different rule obtains in Tennessee, and in the case of *Hollingsworth v. State*, 5 Sneed, it was held that the protection afforded religious bodies extended to their business meetings. Our statute does not admit of such interpretation.

But again it is contended that the allegations in the information as to the manner of the disturbance, if any had been created, are not supported by evidence. It was alleged that defendant disturbed the congregation "by loud and vociferous talking, and by assaulting Joe Jolley." The evidence is that instead of being loud and vociferous defendant's "tone of voice was a common one, low and moderate," and from the remarks he indulged, as above quoted, we would imagine his manner was rather deliberate and positive. He laid his hand upon the good book and spoke of an important and mandatory lesson which it taught, according to his reading, viz.: That if a brother told a lie it was his duty to tell him of it. He did not assault Jolley until after Jolley had jumped up and was advancing upon him with all the appearance of being about to draw a weapon from his pocket, though, as we have seen, such was not really

Syllabus.

the case. From such imminent hostile demonstrations as they appeared to him, defendant unquestionably had the right to stand upon his self-defense, and rely upon his good right arm even in most sacred places. Insulting words or conduct did not justify Jolley's assault upon him. Up to Jolley's assault upon him no disturbance had been created, and had the congregation been one protected by the statute, in our opinion the pugnacious parson and pastor would have been more to blame than any one else.

The lessons of Christian charity, forgiveness and self-control, which in his daily calling he was doubtless promulgating as shepherd to that little flock, should have admonished him, even under such trying circumstances, of the duty of forbearance and forgiveness, or at all events they should have enabled him to control his temper and refrain from resentment and personal violence within the precincts of the sanctuary.

The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

TOM. BALLINGER v. THE STATE.

1. EVIDENCE — IMPEACHMENT OF WITNESSES — CASE STATED. — The principal witnesses for the State being beyond the jurisdiction of the court, the county attorney made affidavit to that fact and introduced their written testimony taken before an examining court. In order to impeach this testimony by showing contradictory statements of the witnesses, the defense sought to introduce their written declarations made before an examining court in the examination of two co-defendants, charged separately with the same offense. *Held*, that the proposed evidence was properly excluded. For an elaboration of the principle, see the opinion *in extenso*.
2. AFFIDAVIT — PRACTICE. — As a predicate for the introduction of the written testimony of one L., the county attorney filed an affidavit

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in which it was averred that this witness was beyond the jurisdiction of the court. After the trial and in the motion for new trial, the defense assailed this affidavit by counter-affidavit. *Held*, that at such stage of the case the proceeding is too late. And *held further*, that it was defective in failing to show that the facts were not accessible, or by proper diligence might not have been accessible, when the affidavit for the State was filed.

ON REHEARING.

3. **SAME.**—An affidavit under article 772, Code Criminal Procedure, which avers that “the witnesses reside out of the State of Texas, and are residents of the Indian Territory,” is sufficient as to non-residence, and non-jurisdiction of the court.
4. **BILLS OF EXCEPTIONS** must state enough of the evidence or facts proved to render intelligible the ruling excepted to. The signature of the judge to the bill of exceptions certifies only that the objections stated were the ones urged, not that they were true in fact.
5. **TRANSCRIPT—DEPOSITIONS.**—District Court Rule No. 75 prohibits the incorporation into the transcript of the commission, notices and interrogatories of a deposition, and this rule is applicable to written testimony taken before an examining court.

APPEAL from the District Court of Cooke. Tried below before the Hon. C. C. POTTER.

The indictment charged the theft, from M. R. Reynolds, of two hundred and ten dollars, on the 30th day of January, 1881. The verdict assessed a term of four and a half years in the penitentiary as the punishment.

About the substance of the testimony of M. R. Reynolds, as shown by the written memoranda taken down and verified on the examining trial, is that, on the night in question, the witness, who was then at “Elm,” a suburban resort of Gainesville, hired the defendant to drive him to town. At a point on West California street, between two livery stables, he got out of the carriage, and the defendant called on him for five dollars, the amount of fare he claimed. The witness, who previously had gold money in his pocket, felt for it, and, missing it, told the defendant he did not have it with him. The defendant “cut up” about it, and witness told him that he had

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money at the wagon-yard. He went into the wagon-yard, reached into his wagon under some hay and got out a paper roll containing \$245. Returning, he commenced unrolling the money, saying to the defendant, "Now I will pay you." When the witness got up near the carriage, still looking in his roll for a five-dollar bill, the defendant snatched the bundle from his hand, and made off with \$210. The witness did not know how many persons were in the hack at the time.

The cross-examination was exhaustive but produced no material variance from the examination-in-chief. Witness declared, however, that he did not return to "Elm" after his money was taken. He denied knowledge of having visited an oyster saloon before his money was taken. He denied that he was drunk at the time of the theft, but admitted that he sometimes got drunk, on which occasions he would not know what he did; and that he did get drunk after his money was taken. He could give no satisfactory account of his movements after these occurrences until he was arrested next morning. He was shaved next morning, but whether before or after his arrest he did not know, but did tell the barber he had no money with which to pay. He had \$293 when he reached town, and spent \$43 before he was robbed. An Indian who came with him to town was with him when he went to Elm before he was robbed.

The substance of the testimony of Charles Byington, as shown by his deposition, was that he came to Gainesville with Reynolds, the last witness, and stopped with him at the wagon-yard. Reynolds had \$294 when they reached town. The witness last saw him with money at about 8 o'clock on the same evening. He had then \$244 in greenbacks, and some gold and silver.

Cross-examined, this witness stated that he got with Reynolds near Boggy depot, on the M. K. & T. Railroad, in the "Nation," and traveled with him to Forrestburg,

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and thence to Gainesville. He saw Reynolds count his money on the road, and saw the money last about 8 o'clock P. M. on the evening of the robbery, when Reynolds gave it to him to keep until called for. He kept it a short while, about an hour, and returned it. The witness remained at the wagon-yard barn while he had the money, and had during the time nearly all of it. He returned it in the yard, and Reynolds went off, the witness did not know where. A. L. Leston had charge of the wagon-yard when Reynolds got the money, and had not closed up.

The witness again saw Reynolds in about thirty minutes. He came to the stable, went to the wagon, and then to "Elm." He was drinking then, and was pretty "tight." The witness walked with Reynolds to "Elm" about 4 o'clock that evening. Reynolds left witness there, returned to town, and then came back. Reynolds first told him of the loss of the money at the "Hall" (Elm). Returning to town, Reynolds ran on ahead of the witness to the wagon, saying he was going to look for his money. This was after Reynolds's last visit to the "Hall." The two went to bed in the wagon about 1 o'clock, when Reynolds again looked for his money. The witness was a full-blood Choctaw Indian, about sixteen years old.

A. E. Leston's testimony was in substance that he was employed at the livery stable of E. E. Graves on the night of January 30, 1881, when the witness Reynolds came to the wagon-yard, saw him then, again about dark, and later after the arrest of the defendant, at which time witness put him to bed. He saw the defendant and Scott Hayes, and heard Gussie Reagan's voice in front of the stable about 11 o'clock on that night. When first seen by the witness this last time, Reynolds was standing outside a hack, between the wheels, and defendant had hold of him. The defendant said: "I want five dollars." Reynolds asked: "What for? It is too much." Gussie

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Reagan said: "It is one dollar apiece." Reynolds replied: "Hold on a minute!" The party wanted Reynolds to get into the hack. He said: "I want to see if I have got all of my money! I had over two hundred and forty dollars." The witness then heard Reynolds say: "Hold on; you have got mighty near all of my money, now!" They then started off up the street; the witness went in, put on his pants, came out, and saw that they had stopped in front of a neighboring lumber yard. He ran towards them in his sock-feet, and heard a "racket" in the hack just before he reached them. The hack started on, the witness running alongside. The witness halloosed to defendant to "stop." While running, he saw Scott Mayes sitting on the front seat in the hack. The party would not stop. Presently the witness met John Owens in his, Owens's, hack, and knowing him to be a policeman, stopped him. The defendant's hack went on to "Elm," and returned in about fifteen minutes with defendant, Mayes and Reagan. The latter, on witness stepping up to the hack, said: "Howdy, Al." The witness then asked defendant where the old man (Reynolds) was, and he replied that he was down at the "Hall." The witness then told defendant to bring him back, and he said in reply that he would if the old man would come. The witness then, not in so many words, but in language they understood, accused them of committing this offense. Gussie Reagan, in reply, asked: "Are you running the old man?"

The cross-examination of this witness did not change his testimony. He denied that Gussie Reagan told him that the old man was going to stay with her, but, without being asked, she said to witness that he, Reynolds, had gone to bed and was going to stay with Flora Smith, alias "Tid-Bit."

John Owens testified that as soon as he heard of the occurrence, he drove fast in his own hack to "Elm Hotel,"

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following another hack. When he arrived he found defendant's and no other hack there, and defendant, Mayes and Reynolds were in the house, close together. When he got there defendant, Mayes and Gussie Reagan got into defendant's hack and drove to town. The witness was a police officer, but his driver being sick, was driving his hack himself that night. While at the hall he heard Reynolds say that the hack drivers had robbed him.

Gussie Reagan was the first witness for the defense. She testified, in substance, that at the time of the alleged offense she was an inmate of the "Elm Hotel." Reynolds, defendant, Scott Mayes, John Bozell, Flora Smith and herself came up town from the "Hotel" that night, to get some oysters. When they reached town, Reynolds said he did not have enough money to pay for the oysters. She asked him how, then, he was going to pay the hack-hire. He replied that he had money at the stable. The hack was then driven there, Reynolds got out, went through or around the stable, and presently returned with a roll of money in his hand, and paid the defendant five dollars for hack fare. The witness defined her position with reference to the defendant and Reynolds, whom she could see plainly, and asserted positively that the defendant did not snatch anything from Reynolds, and that he received from him only the five dollars. The hack then started to the hotel, and when it did so, Reynolds shouted: "Wait! I want to go back." He kept up such a "racket," the witness told the defendant to stop, and take him in; which he did, and the entire party went back to the "Hotel." Reynolds was drunk.

The cross-examination elicited nothing of importance. The witness said that after Reynolds had paid the fare at the stable, she directed the defendant to drive on, as she wanted to get rid of him. He had paid her to "stay" with her that night, but had got so drunk she wanted to be relieved of him.

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D. J. Taylor testified, for the defense, that he was a policeman at the time of the alleged robbery. On the morning following, between daylight and sun-up, he found Reynolds lying on the west side of the square, with his feet on the side-walk and his head back between two houses. He was very drunk and had \$30 or \$40, mostly in greenbacks, in his outside pocket, which the witness took from him.

Jessie Anton testified, for the defense, that on the morning after the alleged robbery Reynolds came into his barber shop, after sun-up, to be shaved. After being shaved, he said he had no money with which to pay. Witness replied that he knew better, and wanted his pay. Thereupon Reynolds turned his back on witness, opened a pair of outside pants, and from the pocket of an inside pair of pants took a roll of money. Witness looked over his shoulder and saw the roll, which was larger than a man's thumb, but did not know whether it was a roll of five or one hundred dollar bills, nor how much it contained.

George Cresswell, for the defense, testified that he was bar-tender at the Elm Hotel on the night of the alleged robbery. While there, Reynolds, who was drunk, handed him a twenty dollar bill to pay for some drinks. The witness paid Gussie Reagan and Flora Smith each five dollars out of it. The old man, Reynolds, went off without getting his change. He did not seem to know or care what went with his money. He did not call for his change until after he heard the witness testify on a former trial, when he called for and got the balance.

The opinion of this court states the matters of fact immediately relevant to the rulings.

ON REHEARING.

Potter & Lanius, for appellant. The leading point we make is the total inadmissibility of the writing offered as

Argument for the appellant.

the testimony of Reynolds, Byington and Leston, for this reason among others, that it was not the testimony of those witnesses, and because there was nothing to show that it was genuine. This point was directly raised in our bill of exceptions number 4, and was assigned as error.

Now the question is, what is there in the record or in fact that even tends to show that the writing offered in evidence is the testimony of those witnesses? We answer that there is absolutely nothing. The style of the case in which the evidence was taken is not given. The number of the cause is not to be found. No heading or introduction, no file-mark, and stranger still no certificate of the justice as provided by the very article of the Code that permits the introduction of such evidence at all. The style, the number, file-mark and heading are generally and properly written, and the certificate is absolutely indispensable. We do not deny that, under the repeated decisions of this court, if this was really the testimony taken in this case on examination, the justice and perhaps other parties might be called to testify what the witness said on such trial, and use the writing as a memorandum.

But no witness is called; nobody identifies the writing; nobody pretends to state what was said by the witness, and nobody assumes the responsibility of saying that the writing is the genuine evidence of the witnesses; and still it is admitted for the purpose of relieving a man of his liberty, in total violation of the statute. Art. 774, Code Crim. Proc.; *Davis v. State*, 9 Texas Ct. App. 365. This identical question was passed on in the above case. In addition to this the Code, arts. 267 and 314, provides how the testimony shall be taken in the examining court, and how it shall be certified, and this is the kind of certificate that is meant in art. 774, above referred to. This certificate should state the taking of the testimony, the swearing of

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the witnesses, the signing by them, the cause in which taken, etc. Now should this certificate be made by the justice but not in the manner provided by law, or if it be not made at all, the only way the writing could be used would be as a memorandum for some witness who, when placed upon the stand, proposes to state the evidence of the witness on the examination; and even if it was a statement of defendant himself, made in the manner provided by law, it would have to be certified, or be proven orally. *Guy v. State*, 9 Texas Ct. App. 162; 1st Greenleaf's Evidence, 227; *State v. Simien*, 30 La. An. 296. As before stated, nothing of this kind was done in this case, but the writing itself was used without identification or substantiation.

If illegal evidence be introduced, a new trial must be granted. *McWilliams v. State*, 44 Texas, 116; *Preston v. State*, 4 Texas Ct. App. 186; *Haynie v. State*, 2 Texas Ct. App. 169. In this case the illegal evidence contains all of the inculpatory facts in the case.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Three parties were originally charged with the theft. Upon their arrest they had three separate trials before an examining court; at which trials the testimony of the witnesses was reduced to writing. Subsequently two at least of the parties charged were separately indicted; one of whom was appellant. Upon his trial, two of the most important State's witnesses being absent, the district attorney made affidavit under authority of article 773 of the Code of Criminal Procedure, that the said witnesses had removed beyond the limits of the State and jurisdiction of the court, and asked to introduce, and was permitted by the court to introduce, the testimony of said witnesses taken at the examining trial of appellant Ballinger. (Code Crim. Proc. art. 772.)

Defendant, for the purpose of impeaching this testi-

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mony by showing contradictory statements of the witnesses with regard to the same transaction, offered the written testimony of these same witnesses taken at the examining trial of Gussie Reagan, one of the other parties who had originally been implicated in the crime. The prosecution objected to this impeaching evidence, upon the ground that no predicate had been laid, nor opportunity offered the witnesses for explanation; which objection was sustained and forms the basis of the principal error complained of.

The general rule, and it is the one which has uniformly prevailed in Texas, is stated very concisely and explicitly by Mr. Wharton in his work on Evidence. He says, "When it is thus intended to discredit a witness by showing that he has on former occasions made statements inconsistent with those made on trial, it is usually requisite to ask him on cross-examination whether he has not made such prior contradictory statements. The question to this effect should specify, so it is said, the person to whom the alleged contradictory statements were made, and as far as possible the time and place. Only upon denial, direct or qualified, by the witness that such statements were made can proof of them be offered. The object of this condition is to enable the witness to recall the incidents and to explain the inconsistency, if there be such. So a witness, not a party, cannot be impeached by putting in evidence his letters unless his attention be called to these letters on his cross-examination, and the other party have an opportunity of examining him thereto. It has been even held that where the deposition of a deceased witness had been by consent read in evidence, another and conflicting deposition of the same witness at a prior trial could not be read in order to impeach the witness, as the attention of the witness had not been called to the conflict." 1 Whart. on Ev. (2d ed.) § 555.

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If his prior depositions in the same case cannot be thus used, *a fortiori* his depositions in another and different case ought not and should not be used. Our statute allowing the testimony of a witness taken at an examining trial to be used subsequently on the final trial, where the witness is beyond the jurisdiction of the court, is an innovation upon the ancient common law, and, in view of the constitutional guarantee that an accused shall have the right to be confronted with the witnesses against him, is permitted solely *ex necessitate* and under circumstances where it appears he did confront the witness and have the right thoroughly to examine and cross-examine him, whether he exercised the right or not upon all the matters testified to by him. We do not think it would be the part of wisdom or sound policy to extend the rule further, and allow such testimony thus taken to be nullified and destroyed entirely by parties who from their own laches or indifference have failed to have it as full and satisfactory as it might have been, had proper diligence been promptly used in the assertion and protection of their rights at the proper time. We are of opinion the court did not err in refusing to allow the introduction of the supposed contradictory evidence.

With regard to the witness Leston it was attempted, after the trial and in the motion for new trial, by the force of counter-affidavits to annul and destroy the affidavit of the district attorney, to the effect that this witness was also beyond the jurisdiction of the court, said affidavit having been made as a predicate for the introduction of his testimony taken at the examining trial. These counter-affidavits came too late to avail defendant, and they fail to show that the facts stated were not accessible, or might not have been accessible by the use of proper diligence at the time when the affidavit of the district attorney was filed and acted upon. Steps should then and there have been taken by defendant to contro-

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vert the affidavit. He cannot be allowed, after he has failed to complain at the proper time, and has speculated upon the chances, or be heard, to say that wrong has been done him when by his own inaction he has been one of the parties to the wrong. The court did not err in overruling the motion for a new trial, so far as it was based upon these counter-affidavits.

We have examined the record in this case with more than ordinary care, and the two questions above noticed are the only ones requiring discussion. For aught else that appears, defendant seems in our opinion to have had a most fair and impartial trial,—a trial in which the law applicable to the facts was most ably expounded by the court to the jury,—and one in which the inculpatory facts adduced against defendant are amply sufficient to support the verdict and judgment rendered.

The judgment is affirmed.

Affirmed.

[After the delivery of the foregoing opinion the counsel for the appellant filed a motion for a rehearing, which elicited from the court the opinion which follows.—REPORTERS.]

ON MOTION FOR REHEARING.

WHITE, P. J. In a most earnest brief and argument filed by appellant's counsel in support of his motion for a rehearing, it is mainly insisted that this court overlooked or failed to consider his fourth bill of exceptions reserved upon the trial. Such is not the case, however. The bill was examined and discussed in the consideration of the case, though not noticed in the opinion, for the reason that it was so imperfect and defective in its presentation of the points raised that they could not properly be considered as questions necessary to be determined.

When the State offered the written testimony of the

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witnesses Reynolds and Byington, taken on the examining trial of the defendant, the defense objected "because the affidavit (of the district attorney) did not show that said witnesses were, at the time of trial nor at the time of the examining trial, non-residents of the State of Texas, or otherwise beyond the jurisdiction of said court trying said cause; and because there was no evidence of the fact that the testimony offered was the testimony taken upon the examining trial; or that the witnesses had ever signed the same or been sworn thereto, and was only a copy; all of which objections were overruled by the court, to which ruling defendant excepts," etc. The affidavit of the district attorney does expressly state that the witnesses "reside out of the State of Texas, and are residents of the Indian Territory;" and it is in conformity with the provisions of the statute regulating the practice in such cases. Code Crim. Proc. art. 772.

With regard to the other objections to the written testimony of the witnesses, impeaching its identification and authenticity, counsel cites and relies for authority upon *Guy v. State*, 9 Texas Ct. App. 162; *Dunlap v. State*, 9 Texas Ct. App. 179, and *Davis v. State*, 9 Texas Ct. App. 363. The rules as enunciated in each of these cases upon the subject are correct, and the objections here taken would, under these rules, have been sufficient to have excluded the testimony, if these objections were in fact true. But, as presented in the bill of exceptions, what evidence is furnished us that the objections were true? It is true the court signed the bill with the objections as set forth, but the allowance and certificate of the judge was not an admission that the objections were true and verified by the record, but simply amounted to a statement by the court that those objections were the ones presented and relied on. Defendant should have incorporated the evidence in the bill of exceptions, or so much thereof as would have verified the truth of his objections. "Bills of exception must state enough of the evidence or

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facts proved in the case to make intelligible the ruling of the court excepted to, in reference to the issues made by the pleadings." Rules Dist. Ct. 59; *White v. State*, 9 Texas Ct. App. 41; *Walker v. State*, 9 Texas Ct. App. 200; *Wright v. State*, 10 Texas Ct. App. 476.

But it may be urged that the statement of facts fails to show affirmatively that the objections are not true, and that the evidence of the witnesses taken on the examining trial as copied in the statement of facts is wanting in all the particulars pointed out by the objections. But it will be noted that all the objections go simply to matters of form in the identification and establishment of the depositions as authentic. The rule with regard to the incorporation of depositions in the statement of facts is that "the commissions, notices and interrogatories in depositions adduced in evidence shall in no case be inserted or copied into a statement of facts, but the evidence thus taken and admitted shall appear in the statement of facts in the same manner as though the witness had been on the stand in giving his evidence, and not otherwise in form or substance." Rules Dist. Court, No. 75. This rule is equally applicable to depositions or the written testimony of witnesses taken on examining trials.

The statement of facts need not show that the prerequisites of the statute with regard to the formal authentication of such evidence have been observed and complied with. Reference, therefore, to the statement of facts cannot aid in determining whether the objections stated in the bill are true or untrue. It devolved upon defendant to show by his bill of exceptions the facts upon which he relied to establish the truth of the objections or the fact that they were well taken. Having failed to do so, his bill of exceptions amounts to nothing, and there was nothing in it upon which we could pass intelligently.

The motion for rehearing is overruled.

Motion overruled.

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JAKE COHEN v. THE STATE.

1. FORNICATION.—CHARGE OF THE COURT which embodies an erroneous instruction as to the punishment prescribed for the offense on trial, is ground for reversal, even though it gave the defendant the benefit of a lighter punishment than that prescribed by the statute.
2. SAME — EVIDENCE.— See evidence held insufficient to sustain a conviction for fornication.

APPEAL from the County Court of Houston. Tried below before the Hon. W. B. WALL, County Judge.

The prosecution was for fornication with one Fanny Simpson, and the punishment, on conviction, was assessed by the verdict at a fine of fifty dollars.

J. A. Carley testified, for the State, that the Simpson women, mother and daughter, occupied a house in the rear of, and about forty steps distant from witness's house and stables. The witness had seen the defendant, on several Sunday mornings, going from towards the house occupied by Fannie Simpson and her mother. He had never seen him come out of the house, and had never seen him going towards it. He had often seen other persons going to the house. Fannie Simpson's reputation for chastity was not good,—nor was that of her mother. The former had borne two illegitimate children.

S. C. Haile testified, for the State, that he lived about one hundred steps from the Simpson place. He had never seen the defendant go into or come out of the house, but had several times seen a man going towards the house whom he took to be defendant. The witness was not positive the man he saw going in the direction of the house was defendant, but from what he had heard supposed that he was.

Harriet Thomas testified that she saw the defendant in the Simpson house on one occasion only. He was sitting in one of the two rooms, smoking a pipe. Fannie Simp-

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son was in the room at the time. The room was lighted. She had never seen defendant going to or from there.

Wm. Denny testified that in passing the Simpson house one night he peeped through a crack and saw the defendant in bed asleep. A woman whose face he did not see, but whom he took to be Fannie Simpson, also occupied the bed, and she was asleep. A lamp was burning in the room at the time. The witness peeped into the room on this occasion through curiosity, and could not say when it was. At another time he saw the defendant sitting in one of the rooms of the house, and the woman Fannie sitting in the same room, on a bed. He had never seen the defendant going to or from the house.

Meyer Grabenheimer testified, for the defense, that the defendant clerked in his store, and that he and witness boarded with H. Gemsbecker, who occupied the witness's residence, about 150 yards distant from the Simpson house. The most direct and dryest route between the store and the residence passed immediately in front of the Simpson house, around which there was no enclosure.

Burnet & Nicks, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was prosecuted by indictment for fornication or habitual carnal intercourse with one Fannie Simpson. The court charged the jury that if they found him guilty they would assess his punishment by fine not less than fifty nor more than one hundred dollars. This is not the punishment affixed by the statute. Penal Code, art. 338. In a criminal case the jury should be distinctly charged as to the punishment which may be imposed by their verdict, and an error in the charge as to such punishment will be ground of reversal although defendant had the benefit of a lighter punishment. *Buford*

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v. *State*, 44 Texas, 525; *Robinson v. State*, 2 Texas Ct. App. 390; *Jones v. State*, 7 Texas Ct. App. 338.

Over and above the error committed by the court with regard to the punishment, the evidence, in our opinion, fails to sustain the charge in the indictment. *Tollett v. State*, 44 Texas, 95; *Barnell v. State*, 5 Texas Ct. App. 113.

The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

OTHO AINSWORTH v. THE STATE.

1. **THEFT—CRIMINAL INTENT.**—That the accused knew that the property taken was not his own, and that it was taken to deprive the true owner of it, is an essential element of the crime of theft; and one usually evidenced by a taking in such manner and under such circumstances as to avoid detection or responsibility. See evidence held insufficient to disclose a criminal intent.
2. **CHARGE OF THE COURT** instructed the jury that “the open and public manner in which property is taken and claimed will not, in any manner, lessen or excuse the offense, if the same was taken with guilty knowledge and fraudulent intent.” *Held*, correct as an abstract proposition, but, in view of the evidence, negative in nature and effect, and calculated to mislead the jury.
3. **SAME.**—Whatever may be the defense interposed, it is the duty of the court to apply clearly, pertinently and affirmatively the law applicable to the facts tending to support it.
4. **SAME.**—In the absence of a fraudulent intent in the taking of the property of another, such taking constitutes a mere trespass upon property, and when the jury may infer from the evidence that the taking was not fraudulent, the accused is entitled to an instruction to the jury as to the distinction between trespass and theft.

APPEAL from the District Court of Eastland. Tried below before the Hon. B. R. WEBB, Special Judge.

The conviction in this case was for the theft of a certain red heifer, the property of J. P. Bateman. Two years in the penitentiary was the punishment assessed.

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J. P. Bateman, the prosecuting witness, testifying for the State, stated in substance that he was the owner of the animal alleged to have been stolen. He described the animal as a red heifer calf, with a white face and a red ring around one eye. The animal was brought forth in the spring of 1880, and through that spring and summer was kept on the premises with its mother, which was used by the witness during that time as a milch cow. During the fall it ran with other cattle belonging to the witness, on the range about witness's place, about two miles north from Merriman. These cattle rarely ever mixed with other cattle, and during the latter part of the year 1880, and the early part of the year 1881, were seen by the witness nearly every day. The animal in controversy, and the two other young ones which ran with the bunch spoken of, were neither marked nor branded. In January, 1881, the Texas and Pacific railway killed some of the witness's cattle, which caused him to notice his stock closely. On the 22d day of January, he was examining a cow recently killed by the railroad, and while doing so observed the bunch, including the stolen heifer, standing near. A few days later he saw the bunch on the range, with the exception of the three young ones. He instituted search for them, and in February, 1881, found the animal involved in this proceeding in Bedford's pasture, and in a herd belonging to J. S. Jerold, who told the witness that he had purchased the animal from the defendant and had his bill of sale therefor, and that the defendant had promised to bring him other yearlings. The day after finding the animal the witness took possession of it under a search warrant and an affidavit of ownership proved by Isaac Greer. The animal, when found, bore the mark and brand of Jerold, freshly made. Said brand is C. A. L. On reaching home with the heifer, it and its mother readily recognized each other.

The witness was positive that the animal he recovered

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from Jerold was his. It was the only one he had ever driven from Jerold's herd in company with Greer, the constable, and Jerold. Of the three animals lost the witness had recovered the one in controversy from the herd of Jerold, and another from the herd of one Milby in Eastland county. The third he has never recovered. The indictment charged that the theft was committed on the 20th day of February, 1881.

The State introduced Isaac Greer, who stated in substance that he was well acquainted with the animal involved in this prosecution, and knew it to be Bateman's property. He remembered when it was missed, and was asked by Bateman, after it was found in Jerold's herd, to identify it, and did so. He had known the animal since it was a week old, and was positive that it belonged to Bateman.

The State next introduced an instrument in writing signed by the defendant and his attorney, wherein, to avoid a continuance by the State for the testimony of Jerold, the defendant admitted that Jerold would, if present, swear that defendant did sell to him, Jerold, the animal claimed subsequently by Bateman, which fact defendant admitted; and that Greer, Bateman, Simerll, the constable, and Jerold drove the animal from the herd, after it was found, to the town of Eastland.

Lev. Ainsworth testified for the defense that he was the uncle of the defendant, and lived on Leon creek, near the residence of the defendant. The defendant owned some cattle during the year 1880. During the summer and fall of that year the witness milked a cow that belonged to the defendant, which cow had at that time a red heifer calf with a white face, and, the witness believed, a red mark around one eye. Before turning the cow and calf over to the defendant, the witness marked it with a swallow-fork in the left ear. Ed Holloway drove the cow and calf from the witness's house to the

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defendant's. The witness had since seen the animal on the range, between Bateman's house and the town of Merriman. It had been branded C. A. L. on the side.

Ed Holloway testified that, in the fall of the year 1880, he assisted the defendant in driving a cow and calf from Lev. Ainsworth's to defendant's residence. The calf was a red heifer, with white face, unbranded, but marked with a swallow-fork in the left ear. The witness had since seen the animal in the C. A. L. brand.

J. W. Hogue testified, for the defense, that he was present at defendant's house in February, 1781, when J. S. Jerold bought some cattle from defendant. Among them was a red heifer calf with a white face, unbranded, but marked with a swallow-fork in the left ear, the offspring of one of defendant's cows, which witness had since bought. The witness had since seen the same heifer in the C. A. L. brand.

J. H. Davenport and G. P. Finlay, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was convicted of the theft of a red heifer, the property of one J. P. Bateman. If, instead of a criminal prosecution for theft, the proceeding had been a civil action to determine the ownership of the animal, a verdict in favor of either party, prosecutor or defendant, in view of the statement of facts, could not have been set aside for want of evidence to support it, nor upon the ground that it was against the evidence,—so evenly balanced does the evidence appear from the record. There can scarcely be a question but that both parties owned a red, white-faced heifer, about the same age and almost precisely similar in appearance and flesh-marks, even to the red ring over one of its eyes.

Defendant's witnesses testify that his heifer had been

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marked with a swallow-fork in one of its ears before he sold it to Jerold, and they swear moreover that the animal in question, claimed by the prosecutor and which Jerold after his purchase had marked and branded, was this identical animal. Bateman's heifer had never been marked. In this unsatisfactory state of the evidence, the testimony of Jerold would be and is very important, even if this was a civil suit, in settling the question as to whether or not the animal had a swallow-fork in its ear when he purchased and placed his own mark upon it.

Again, it is also manifest from the evidence that at the time the red heifer was stolen two other calves of Bateman's were also stolen, one of which was found by him in a herd of cattle in possession of Harry Milby, in Eastland county, about the same time the red heifer was found in Jerold's herd. Now, how did Milby acquire possession of this other calf? If from defendant, it would have been a strong if not overwhelming circumstance against defendant, especially if, in connection therewith, the State had shown by Jerold that the heifer he purchased was not marked with a swallow-fork. Neither Jerold, Milby, nor any other witness was put upon the stand to testify as to these matters.

Without this evidence or other and stronger evidence of the fraudulent intent of defendant than is exhibited, we do not think the conviction should stand. "A fraudulent taking of the property of another embraces the idea that the taker knew that it was not his own, and also that it was done to deprive the true owner of it. This is usually evidenced by its being done in such manner and under such circumstances as to avoid detection or responsibility to the true owner." *Smith v. State*, 42 Texas, 444. There was no concealment or covert action by Ainsworth tending to show that his taking of the animal was with fraudulent intent. For aught that appears, there is nothing in the record so far as his conduct is disclosed

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which should have satisfied the jury that he did not believe the heifer was his property, as he claimed it to be and by his witnesses positively proved it to be.

In this connection the charge of the court to the jury was "that the open and public manner in which property is taken and claimed will not in any manner lessen or excuse the offense, if the same was taken with a guilty knowledge and fraudulent intent." Abstractly considered the charge is a correct enunciation of the law. But it is obnoxious in that it is negative in its nature and effect, and was calculated to be misconceived by if it did not in fact mislead the jury. "The rule applicable to all defenses, whether complete or otherwise, is that the court below must apply the law clearly, pertinently and *affirmatively* to the facts tending to support the defense." *Johnson v. State*, 43 Texas, 612; *McLaughlin v. State*, 10 Texas Ct. App. 340.

The charge is also liable to the objection that it did not sufficiently draw the distinction between trespass and theft,—a distinction demanded by the character of the evidence. "In theft the fraudulent intent is a necessary constituent of the offense. The act of taking without such intent is a mere trespass. If the taking be under an honest though mistaken claim of right, it would seem hardly necessary to cite authority that it is not theft. In cases where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft." *Bray v. State*, 41 Texas, 203; *Isaacs v. State*, 30 Texas, 451; *Neely v. State*, 8 Texas Ct. App. 64; *Landin v. State*, 10 Texas Ct. App. 63.

Because the evidence is insufficient, and for the errors in the charge of the court as indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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FELICIANO GARZA v. THE STATE.

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29	308

1. EXPRESS MALICE.— See the opinion in this case for facts held sufficient to show express malice, and, consequently, had death ensued, murder. See, also, rules applicable to cases of sudden killing in the absence of previous ill-feeling, etc.
2. SAME.— CHARGE OF THE COURT in a trial for murder, or assault with intent to murder, is deficient if it fails to define malice.
3. SAME.— PRACTICE IN THE COURT OF APPEALS.— This court will not review instructions complained of, when the accused has reserved no bill of exceptions thereto, nor asked any charge upon the issues in controversy.
4. SAME.— EVIDENCE.— Acts or admissions or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent as evidence to show malice. The bill of exceptions in this case does not present the objection to the admission of the declarations of the defendant in such manner that they can be held irrelevant.

APPEAL from the District Court of Webb. Tried below before the Hon. F. E. MACMANUS, Special Judge.

The opinion recites, in substance, the evidence for the State upon which the conviction in this case was had, except that the defendant, according to the testimony of one witness, denied to him that he participated in the assault. The facts stated, however, were testified by three witnesses. The punishment assessed was a term of seven years in the penitentiary.

Gavino Garza testified, for the defense, that he arrived on the scene after Carlos Ramirez had been knocked down, and while he was lying on the ground. The defendant and Stefana Robles, wife of Carlos Ramirez, the party injured, and who was the main witness for the State, were standing near the prostrate man, talking. The woman said to the defendant: "You did it! you did it!" and the defendant answered, "No madam, it was not me; you are mistaken; it was the other man who is to blame, and not me." The witness asked the de-

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fendant who threw Ramirez, and received the answer previously given to the woman. The defendant also said to the woman: "I don't think your husband will die, but if he does, I will look out for, and take care of you." The defendant had been drinking and riding about all day, and was partly drunk when talking to the woman and the witness.

Manuel Robles testified, for the defense, that as he was crossing the street he saw the defendant, on horseback, and the woman Robles and Ramirez near by. Ramirez was very drunk, and said to the defendant: "Get down, you cuckold, and I'll cut you to pieces." The defendant made no reply, but rode off.

C. A. McLane, for the appellant. "The court erred in admitting the testimony of Estefana Robles, as set forth in defendant's first bill of exceptions."

No principle of law is better established than that the *allegata* and *probata* must correspond. In order to introduce proof showing a repetition of an offense under art. 819, Penal Code, it is an indispensable requisite that the fact of the first conviction, together with its circumstances of time, place and court, should first be alleged. *Long v. State*, 36 Texas, 6.

The indictment in this case is blandly innocent of any such allegation. Under the exhaustive opinion above quoted (the solitary Texas decision upon this question to be found throughout the mass of our Reports), it would clearly appear to be error to admit testimony showing a repetition of the offense in the absence of this prerequisite supporting allegation. Yet this has been done in this case. The part of the testimony of Estefana Robles, complained of, tends, though indirectly, yet intelligently and unerringly, to impress the minds of the jury with the fact of a previous conviction in another case.

The defendant, in other words, is presented to the jury

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in all the malodorousness of a convict recently returned from the penitentiary! Instead of the protecting ægis of a fair and impartial trial—the non-presumption of guilt—standing over him, he is exhibited before the arbiters of his liberty in all the offensive, moral deformity of a convicted felon, with the stench of his dungeon still around him!

The words—"Well, I don't care if I do have to go back to making buckets again," attributed to appellant, certainly meant something. Taking the proffer of the State to introduce proof showing, *in effect*, that appellant was a returned convict, in connection with the admission of the district attorney himself in his opposition to appellant's motion for a new trial, that the said district attorney did "inform the jury that, as certain testimony which he had *intended* to offer had been adjudged incompetent, they would have to draw their own inferences regarding what was meant by the defendant when he told the witness, Estefana Robles, that he, defendant, supposed he would have to go back to making buckets again!"—the conclusion is irresistibly forced upon the candid mind that these words had all the telling effect upon the jury that the tedious and formal process of the proof itself of the inhibited fact might have had. The court will all the time bear in mind that the jury did not retire. They heard all,—the offer of proof, the argument of counsel for State and prisoner, and the court's ruling. It might be contended that the appellant should not be heard to complain because the court's ruling was in his favor. Granted, had it stopped there. But the prejudicial impression against appellant already initiated in the minds of the jury, though yet but a spark, was fanned into a flame by two circumstances: 1st, the subsequent refusal of the court to verbally instruct the jury not to allow the proffered testimony to influence them against defendant; 2d, the admission of the part of the witness Estefana's

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testimony about the buckets, etc., objected to as irrelevant and incompetent. That this testimony did influence the jury is conclusively shown by the excessive verdict they returned. At the worst, the act of defendant could not, under the evidence, have been more than an aggravated assault; and in this, counsel believes he is borne out by the statement of facts, a close inspection of which he respectfully challenges. 7 Texas Ct. App. 627; 4 Texas Ct. App. 417.

The court erred in overruling defendant's motion for a new trial. As several grounds of the motion for a new trial have already been discussed under the first proposition, the remainder only will here be noticed.

The charge nowhere defines or attempts to define malice, either express or implied. It has been repeatedly held by this court that malice is an essential element of murder and must be charged, whether asked or not. *Ewing v. State*, 4 Texas Ct. App. 417; *Hodges v. State*, 3 Texas Ct. App. 470, and the numerous authorities there cited; *Williams v. State*, 3 Texas Ct. App. 316; *Daniels v. State*, 4 Texas Ct. App. 429; *Anderson v. State*, 1 Texas Ct. App. 730; *Johnson v. State*, 4 Texas Ct. App. 598.

The court erred in paragraph 4th of the charge, because its phraseology was calculated to mislead the jury.

"Though a charge to the jury be framed in the language of the Code, yet if it fails to furnish such an exposition of the meaning and intent of the law as the facts require, it is erroneous."

Riojas v. State, 9 Texas Ct. App. 65; see also *Whaley v. State*, Id. 305; *Reed v. State*, Id. 317.

It is the absolute province of the court to give the law of the case. The jury has its uninvadable domain in the facts of the case. In its exposition of the law, the court is nothing unless clear.

It is contended that while the 4th paragraph of the charge is good law, and were it dove-tailed with the defi-

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nition of malice, might have passed muster, yet as it is there put down, unassisted with anything explanatory of its meaning, it tends more to confuse and mislead the jury than to enlighten.

In *Daniels v. State*, 4 Texas Ct. App. 429, the court is very felicitous in marking out the duty of courts in this regard, when it says: "Juries are not presumed to know the law; on the contrary they are bound to receive the law from the court and be governed thereby." Code Cr. Proc. art. 676. The court erred in paragraph 9th of the charge, because the same is not applicable to, nor based upon the state of facts shown, either as to the manner or the means of the assault.

In *Lester v. State*, 3 Texas Ct. App. 25, this court uses the following language: "By the law applicable to the case and the 'law of the case,' as employed in the Code (articles 677 and 678, Cr. Proc.), evidently it meant the law applicable to the case as made out by the proofs — the law applicable to the pleadings and the evidence — and this has been the uniform construction given to them by the Supreme Court and by this court."

Paragraph 9th is the keystone of the entire charge, and as such should it not predicate the law upon the facts proven on trial?

It is insisted that this portion of the charge is too general in its terms. An unexceptionable charge in this respect would seek strictly to ask the jury what the particular facts are, and then inform them as to the law they should apply to those facts — should they find them true.

Now, the facts show that the defendant and another, with time and place as alleged, made an assault with a *certain rope*, etc. Should not the court have mentioned the instrument with which the assault is charged to have been made? Is it not as important to mention the character of instrument used as it is to state the time, place, name of injured party, etc. The court merely refers to the

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offense as "set forth in the indictment." In thus doing the court cannot be said to have given the law applicable to the evidence as well as the pleadings of the case.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The circumstances attending the alleged assault with intent to murder, of which crime appellant was convicted, are in brief that Carlos Ramirez and his wife were walking in the middle of the street in the city of Laredo, when this appellant and one Ysabel Ramirez, who were riding on horseback behind them, approached, each having and holding the end of a rope which was swinging down between their horses. Defendant remarked "Let us lasso them." The woman stepped quickly to one side as they dashed forward on their horses. The rope which dangled between the two horsemen struck Carlos Ramirez about the calves of his legs, throwing him high up in the air. As he fell, the woman says in her testimony, "I believe he would have been killed if I hadn't caught his head before he fell, and broke the force of the fall." Dr. Arthur, who was called to see the injured man, testified that "he examined him and found he had received severe bruises, principally about the hip, breast and back; believe the probabilities are he would have been killed had he been sober when he got the fall. Drunken men as a rule escape severe injury from falls. There was also about three inches of sand where he fell, and that helped to save his life."

Now, had death resulted under the above state of facts, would the crime have been murder? We think most clearly so. The well-settled rules are that "in cases of sudden killing in the absence of previous ill-feeling, or where it is too slight to be presumed, there may often be found ample evidence of express malice in the means used and manner of doing it. For a man is always pre-

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sumed to intend that which is the necessary or even probable consequences of his acts, unless the contrary appears. However sudden the killing may be, if the means used or manner of doing it, or other external circumstances, indicate a sedate mind, or a formed design to kill or do great bodily injury, and a murder be committed, it will be upon express malice. In such case, if it appeared that the means used were likely to kill or do great bodily harm, endangering life, and a killing took place, the natural inference would be that it was upon express malice." *McCoy v. State*, 25 Texas, 33. Circumstances of enormity, cruelty, deliberate malignity, even calm demeanor and absence of passion, will be sufficient oftentimes to establish the formed design to take life or do some great bodily harm.

In the interesting brief of counsel for appellant the charge of the court to the jury is subjected to stringent criticism in several particulars. One of the errors thus pointed out is certainly tenable, and under repeated decisions of this court must be held fatal to the validity of the judgment of conviction. It nowhere defines or explains to the jury the meaning of the term malice, which is used in the definition of, and is the essential ingredient of all murder. *Hodges v. State*, 3 Texas Ct. App. 470; *Ewing v. State*, 4 Texas Ct. App. 417; *Daniels v. State*, 4 Texas Ct. App. 429.

In the absence of a bill of exceptions reserved thereto, and a failure to request instructions more full and comprehensive, we cannot say that the other portions of the charge complained of show such error either of omission or commission as would require a reversal.

With regard to the only bill of exception, which was to the statement of defendant made shortly after the infliction of the injury and when he was charged with its commission, viz.: "Well, I don't care if I do have to go back to make buckets again," in the manner in which it

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is presented in the bill, it cannot be said that the evidence was irrelevant and inadmissible. "Acts and admissions or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent evidence as tending to show malice." (*McCoy v. State, supra.*)

Because of error in the charge of the court, as above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

W. P. BUCKALEW v. THE STATE.

1. SWINDLING.—An essential element of the offense of swindling is that the party injured, in parting with his property, actually relied upon and was deceived by the fraudulent representations or devices of the party accused.
2. SAME.—FALSE PRETENSE, in order to authorize an indictment for swindling, need not be such an artificial device as will impose upon a man of ordinary prudence and caution, nor need it be such as cannot be guarded against by ordinary caution. But if the pretense was absurd or irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, he could not have believed it or been deceived by it, and the pretense is not within the purview of the definition of swindling. See the opinion *in extenso*, for the principle discussed, and for an information held insufficient to support a conviction for swindling.

APPEAL from the County Court of Lee. Tried below before the Hon. J. F. Crow, County Judge.

The conviction was for swindling, and the penalty was assessed at one hour's confinement in the county jail.

The opinion fully discloses the case.

J. L. Rousseau, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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WHITE, P. J. This case was a prosecution by information for swindling. We reproduce the information in full, since the view we have taken of the case only requires a discussion of the sufficiency of that instrument. It reads:

“In the name and by the authority of the State of Texas, I, N. A. Rector, county attorney of Lee county in said State of Texas, now here in the County Court, at the December term, A. D. 1881, thereof, do present this information (founded upon the written affidavit of George Cooper herewith filed), which charges and presents to said County Court that one W. P. Buckalew, in the county of Lee in the State of Texas, on the first day of December, A. D. 1881, did falsely represent to George Cooper that he, George Cooper, had killed and unlawfully appropriated a certain hog belonging to him, said Buckalew, and that one John Wesson had told him, Buckalew, that he, said Wesson, and his brother William Wesson had seen said George Cooper kill and appropriate the aforesaid hog of said Buckalew—all of which said representations were utterly false; George Cooper had not killed and appropriated a hog belonging to said Buckalew, and said Wesson had never told said Buckalew that he, Wesson, or anybody else had ever seen said Cooper kill and appropriate a hog of his, said Buckalew's; and that, by means of said false representations, said Buckalew did unlawfully obtain from said Cooper five dollars in money, with intent to appropriate it to his own use; contrary to law and against the peace and dignity of the State.”

If subjected to strict legal criticism, several objections might be urged to this information with great plausibility and force, even notwithstanding the liberal provisions of what is commonly known as the “common sense indictment bill,” enacted by the 17th Legislature (General Laws 1881, pp. 60–63). We shall notice but one objection. The leading if not the main idea embraced in the definition of

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swindling is that, not only has the swindler acquired, but that the party injured has been induced to part with his money or property by means of some false or deceitful pretense or device, or fraudulent representation, which he believed to be true. In other words, that the injured party has been deceived, and been deceived by being told and relying upon that which was false. Penal Code, art. 790.

Let us apply this test to George Cooper, the party alleged to have been injured. Admit that Buckalew told him everything alleged in the information, and that every word of it was false, was or could he have been deceived by it? and if not, can Buckalew be convicted of swindling?

In *Colbert v. State* this court said: "There has been a conflict of opinion as to whether the false pretenses, to be indictable, should be such as would necessarily impose upon a man of ordinary prudence. In New York, Pennsylvania, Arkansas, and some of the other States, it has been held that a representation, though false, is not within the statute making it an offense to obtain money or other property under false pretenses, unless calculated to deceive persons of ordinary prudence. In Pennsylvania and New York such is no longer the law, it being now held that it is not less a false pretense that the party imposed upon might by common prudence have avoided the imposition. We think that it is generally received both in England and the United States as the law, that the pretense need not be such an artificial device as will impose upon a man of ordinary prudence or caution; that the pretense need not be such as cannot be guarded against by ordinary caution or common prudence." 1 Texas Ct. App. 314.

But, even though ordinary caution and common prudence are not required in the detection and avoidance of the imposition, yet we apprehend that there has been no

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change in the rule, so well founded in common sense and law, that, "where the pretense is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act." *Comm. v. Hutchison*, 2 Par. (Pa.) Sel. Cas. 309; *Comm. v. Hickey*, id. 317; *Comm. v. Poulson*, id. 326.

In the case before us Cooper, of all persons in the world, best knew whether he was guilty or not of killing Buckalew's hog. Let him take either horn of the dilemma. If he was guilty he was not deceived, and the representations could in no wise be denominated false or fraudulent. If he was not guilty, then he must have known that fact equally as well, and no statement or representation of Buckalew could possibly have deceived or imposed upon him with regard to that matter.

Where the knowledge of a fact is within a man's own breast, he cannot be deceived by another person's falsely representing the fact to him; he knows at the instant that the statement made is either true or untrue. The reliance by the injured party upon the truth of some false or deceitful pretense or device, or fraudulent representation, is the gist of the offense of swindling. Upon what false statement did he rely? That he killed the hog? Why, he knew he had not killed it; or he knew that he had killed it, and that knowledge would corroborate instead of falsifying the statement. So much for the representations made by the defendant Buckalew to Cooper, on his own responsibility.

Now let us consider the allegation that the Wessons had told Buckalew that they had seen Cooper kill and appropriate Buckalew's hog. Admit, for argument's sake, that that statement was false, could it possibly have deceived Cooper to the extent that he would rely upon it with regard to the main fact, which was that he had killed the hog? By no means; because he must have known, and did know as well if not better than the Wessons, whether he had or not, and the fact that Buckalew

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lied about what the Wessons told him could not impose falsely upon Cooper, nor deceive him as to whether or not he killed the hog. All Buckalew's statements may have been knowingly false, and yet, if Cooper did not rely upon them as being true, and did not pay his five dollars because he believed them true, Buckalew cannot be held amenable under the statute for swindling.

The information destroys itself by its own allegations, and the judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

FRANK KENNON v. THE STATE.

1. CONFESSIONS OF UNWARNED PRISONER.—The Code of Procedure, article 750, expressly inhibits proof of extrajudicial confessions by an unwarned prisoner unless, in connection therewith, he stated facts or circumstances that are found to be true, and which conduce to establish his guilt. If the inculpatory circumstances disclosed by the prisoner are proved to be true, what he said in disclosing them is admissible against him for the purpose of explaining the disclosures themselves. But the truth of the inculpatory circumstances must be shown by evidence *aliunde* the statement of the prisoner.
2. SAME — CASE STATED.—In a trial for horse-theft the State was permitted, over objection by the defense, to prove that the defendant, while in legal custody and not warned that his statements might be used against him, said, in substance, that one S. got the animal at a certain locality and in the night, and brought it to him, the defendant, and that he took a bell from around its neck and rode it off. The State proved that the animal was taken in the night and from a locality corresponding with that described by the defendant, and that, when last seen before it was stolen, it had a bell around its neck; but, aside from the defendant's statement, there was no proof that he took the bell off the animal and rode it away. *Held* that, assuming that these latter circumstances would, if shown to be true, conduce to establish the guilt of the defendant, the disclosure of them by the defendant, while he was in custody and uncautioned, was not evidence against him; and their admission over his objection was error.

Statement of the case.

APPEAL from the District Court of Fayette. Tried below before the Hon. L. W. MOORE.

The conviction in this case was for theft of a mare, the property of Mrs. Collins. A term of twelve years in the penitentiary was the punishment assessed by the jury.

Mrs. Collins, for the State, testified that she lived near West Point, in Fayette county, Texas, and that her mare was taken from there, about July 31, 1881. The mare was taken in the night, and without witness's consent. The mare had been worked the preceding day, and at night was hobbled out with a piece of chain, and had on a bell. The next morning she was gone. About six or eight weeks afterwards she was brought back to witness by Mr. John Farquhar. Witness heard of the mare being in Austin county about ten days after she was missed. The information came from Mr. Lewis, the sheriff of Austin county. Witness did not know who took her mare, and could not say that she had ever seen the defendant prior to the trial. She stated that the mare was then in the town of La Grange, where the court was in session, and that several persons had recognized the animal that day.

This witness was recalled at a subsequent stage of the trial, and testified that the place where she lived and from which the mare was taken is three or four miles east of West Point, and near the intersection of the La Grange and West Point road by a road to Flatonia. She had never recovered the bell and chain which were on the mare when stolen.

John Farquhar, for the State, testified that he knew Mrs. Collins and the mare in question. He recovered the mare from J. B. Lewis, sheriff of Austin county, where the witness got the animal and brought it back to Mrs. Collins. The mare, while witness was testifying, was in the town of La Grange, and had been seen that day by J. B. Lewis and Burrell Garnett.

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Burrell Garnett, for the State, testified that he identified the defendant as Frank Kennon, whom he had known for eighteen months or two years. Early in August, 1881, witness met the defendant and Howard Stewart in Austin county. Defendant was riding the same bay mare which witness had seen in possession of John Farquhar the day of the trial. When witness met the defendant and Stewart, in Austin county, the latter was riding a sorrel horse, and witness bought the horse from Stewart. Witness asked the defendant if the sorrel horse was "good property," and remarked that he did not want to buy unless the title was good. Defendant replied that he saw his brother trade the horse to Stewart, and that the latter's title was good; and at the same time the defendant offered to sell the mare he was riding to witness for twenty-five dollars. Witness paid fifteen dollars to Stewart for the horse, and asked defendant a second time if Stewart's title to the horse was good, and defendant replied that it was so far as he knew. In the evening of the same day sheriff Lewis of Austin county arrested both Stewart and the defendant, and the sorrel horse was taken from the witness. The bay mare was taken from the defendant by Lewis.

J. B. Lewis, for the State, testified that he was the sheriff of Austin county. He knew the defendant, and early in August, 1881, arrested him and Howard Stewart for the theft of a horse stolen in Gonzales county. Witness found the horse in the possession of the preceding witness, Garnett. When arrested by witness, the defendant had in his possession a mare which, as afterwards was ascertained, belonged to Mrs. Collins. This mare the witness had seen in the town of La Grange the same day but before he was examined as a witness in this case. When the arrests were made by witness he did not know who owned the mare nor where she came from; but he subsequently ascertained where she came from by means of statements made by defendant while in arrest for theft of

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the sorrel horse found in Garnett's possession, but before he was arrested for theft of the mare. When defendant made the statements he had not been warned of the legal consequences, nor did witness subsequently warn him.

At this stage of the testimony the court retired the jury pending the further examination of the witness with a view to the admissibility of the statements made by the defendant to him; and at the conclusion of that inquiry the court excluded portions of the statements, and held others competent,—the defense reserving exceptions to the latter ruling.

The jury being recalled, the witness detailed to them the portion of defendant's statements allowed by the court, as follows:

"Defendant told me that he and Howard Stewart got the mare in the night-time, in Fayette county, at a place about four miles east of West Point, near where two roads cross. The name of the roads I have forgotten. That at the time of the taking, the mare was grazing near the road, and had on a chain and a bell; that Stewart went and caught the mare, and defendant stayed in the road; that Stewart caught the mare where she was grazing, and brought her to the defendant in the road. That the defendant took the bell and chain off of the mare and threw them away, and put his saddle on her, and rode her off, he and Stewart traveling together. That this was a few days before he was arrested by the witness. The defendant stated that he had not taken the mare, but that it was Howard Stewart who did so."

Proceeding with his own testimony the witness Lewis stated that the defendant's disclosures enabled him to locate the neighborhood from which the animal had been taken, and he wrote to the sheriff of Fayette county to ascertain whether any person living in that neighborhood had lost a mare, and through the sheriff of Fayette county the witness learned that Mrs. Collins had lost one.

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He then wrote to Mrs. Collins, and after hearing from her he turned the mare over to Mr. John Farquhar.

The State having closed its proof, the defense introduced Sid Kennon, a brother of the accused. The witness stated that about the last of July or first of August, 1881, Howard Stewart came to a railroad wood-yard in Gonzales county at which the witness, the defendant, and several others were at work, and told the defendant that he, Stewart, wanted to hire him to go with him, Stewart, to Austin county. After some conversation Stewart agreed to pay the defendant seventy-five cents a day, and to furnish him a horse to ride during the time he should be gone. This was early in the morning. Stewart was riding a brown horse and leading a sorrel pony. As soon as defendant agreed to go he commenced getting ready, as Stewart said he was in a hurry to start. About dinner time they started off, the defendant having put his saddle on the sorrel pony which Stewart had been leading. The pony was furnished by Stewart for the defendant to ride, and the defendant went off riding it. Joe Davis, Tom Kennon, and perhaps Praidd and John Swabs were present, and must have heard the conversation and witnessed the facts stated. The defendant and Stewart both lived in Gonzales county at the time.

By the minutes of the court and the admissions of the prosecution, the defense showed that Howard Stewart, at the pending term of the court, had been convicted of the theft of the same mare involved in this case; that Stewart pleaded guilty to the indictment which charged him with the theft, and that the indictment against Stewart alleged the same ownership and the same time of the taking as does the indictment against the defendant.

T. J. Paine, for the appellant.

H. Chilton, Assistant Attorney General, and *T. H. Franklin*, district attorney, for the State.

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HURT, J. The appellant was convicted of the theft of a mare, the property of Mrs. Collins. A solution of one question will dispose of this appeal.

The appellant was in custody of the sheriff, and while thus in arrest, not being cautioned or warned as is required by law, made the following confession to J. B. Lewis: "Defendant told me that he and Stewart got the mare in the night-time, in Fayette county, at a place about four miles east of West Point, near where two roads cross; that, at the time of the taking, the mare was grazing and had on a piece of chain and a bell; that Stewart caught the mare when she was grazing and brought her to defendant in the road; that defendant took the bell and chain off of the mare and threw them away, and he put his saddle on her and rode her off, he and Stewart traveling together." Witness Lewis says, "that from the statement of defendant he was able to locate about the place from which the animal had been taken, and wrote to the sheriff of Fayette county, . . . and through him found out that Mrs. Collins had lost one." Neither the chain nor bell was found. The defendant objected to this evidence because he was under arrest; the court overruled his objection, and he reserved his exceptions.

Defendant being under arrest, under the above state of facts, are these confessions admissible? Article 750 of the Code of Criminal Procedure provides that "the confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen

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property, or instrument with which he states the offense was committed."

This statute has been passed upon by our Supreme Court and Court of Appeals, and construed to admit only facts and circumstances found to be true which conduce to establish the prisoner's guilt, such as finding secreted or stolen property, etc. When these results are reached by means of the confession, then the rule admits not only the fact that the stolen property had been traced by means of the information received from defendant, but the information or declaration itself. "If the property was recovered by means of the information, then it would be admissible to prove not only that fact, but what was said by the prisoner in conveying the information." But at the same time this would not let in other admissions, statements or declarations, if any such there were, not directly connected with or explanatory of such information. This is the full extent to which the previous decisions have gone. *Davis v. State*, 8 Texas Ct. App. 500; *Selvidge v. State*, 30 Texas, 60; *Warner v. State*, 29 Texas, 369; *Strait v. State*, 43 Texas, 486; *Speight v. State*, 1 Texas Ct. App. 551; *Berry v. State*, 4 Texas Ct. App. 492; *Zumwalt v. State*, 5 Texas Ct. App. 521.

From the above rules, we conclude that the facts or circumstances that are found to be true, which conduce to establish his guilt, are admissible, and that what was said in conveying the information of these facts (found to be true and conducing to guilt) is also admissible for the purpose, if connected therewith, of explaining the information, and not for any other purpose. Here the fact that the mare was brought to defendant, where taken, is admissible for the purpose of explaining the fact that he took the chain and bell from her, and not for the purpose of proving that he took her, for the rule requires that the facts or circumstances "shall be found to be true," and unless found to be true, though admitted will be excluded.

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We are proceeding upon the hypothesis that the chain and bell transaction was a fact found to be true and conduced to prove the guilt of defendant. No fact confessed by defendant, unless connected with or explanatory of this matter, is admissible, and the explanatory facts are admissible only for the purpose of elucidating the information given of the facts found to be true.

To illustrate: Suppose that defendant confessed to the theft of the mare, this would not be admissible though proof that the mare was stolen be full and complete. Therefore when the main fact cannot be confessed, some fact tending to prove the main fact (which is the theft of the mare) must not only be confessed but must tend to identify the defendant as the thief. And the fact confessed must be found true by other evidence.

What fact confessed was found true by other evidence in this case? None whatever. It is true that the mare, when last seen, had on a chain and bell, but these facts do not prove that defendant took these articles from the mare. If defendant had stated that he concealed or placed these or either of these articles at a certain place, and they are found either upon or in pursuance of this information where they were said to be placed by defendant, the rule would have been complied with, and the facts would be admissible. This, however, was not the case. This question is thoroughly discussed in the cases above cited.

We are of the opinion that the court erred in admitting the confessions of the defendant, and that the judgment of the court must be reversed and the cause remanded.

Reversed and remanded.

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EMILE GROSSE *v.* THE STATE.

1. **ARREST — CONFESSIONS — CASE STATED.**— While the defendant was in a bar-room violating a city ordinance, the marshal of the city was notified, and summoned a *posse* and confined the defendant in a neighboring crib. *Held*, that notwithstanding the marshal's testimony that he did not "consider" that he had the defendant under arrest, the arrest was complete, and statements made by the defendant under such circumstances were not admissible as evidence against him.
2. **IMPEACHING TESTIMONY — PREDICATE — PRACTICE.**— If it be proposed to contradict the testimony of a witness by his deposition taken before an examining court, it is necessary to show him his signature to the deposition, and so much of its contents as involves the statements sought to be impeached. A question which directed the attention of the witness to the "examining trial in this case" sufficiently laid the predicate as to time and place.
3. **SAME.**— It was not necessary to ask the witness if his deposition was read over to him in the examining court. The fact, however, that it was not read over to him might be elicited as a circumstance tending to account for discrepancies between it and his testimony at the final trial of the case.
4. **SAME.**— If the deposition itself is to be used for the purpose of contradicting the witness, it must be shown that he subscribed it or put his mark to it. But if the deposition was inadmissible because not signed or not authenticated, it was competent to contradict the witness by oral proof of his conflicting statements in the examining court, if they were of a material nature.
5. **PRACTICE — EVIDENCE.**— The Code of Procedure, art. 661, expressly provides that evidence necessary to the due administration of justice may be introduced at any time before the argument of the cause is concluded. This provision applies as well to the predicate for the proposed evidence as to the evidence itself.
6. **SAME.**— In the cross-examination of the prosecuting witness the defense laid no predicate to contradict his testimony by proof of his prior statements conflicting with it, but, after the State had closed its evidence, proposed to recall the witness for that purpose, and then contradict his testimony in chief by his deposition at the examining trial of the cause. *Held*, error to disallow the recall of the witness,—no ill-faith or sharp practice being imputable to the failure to lay the predicate in the course of the cross-examination.
7. **SAME — ARGUMENT.**— Counsel for the defense promptly objected to the prosecuting counsel, in his closing address to the jury, telling

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them in effect that public opinion convicted the defendant of the theft imputed to him. *Held*, that the court below should have sustained the objection, and have restricted the prosecuting counsel to discussion of the evidence.

APPEAL from the District Court of Comal. Tried below before the Hon. THOS. M. PASCHAL.

The indictment was presented on December 6, 1881, and charged that, on the 1st of the preceding July, the defendant stole from Andreas Wucherer sixty-five gold pieces, current money of the United States, each of the value of twenty dollars. At the trial of the cause the jury found the defendant guilty and assessed his punishment at a term of four years in the penitentiary.

Wucherer, the owner of the stolen money, was first introduced by the State. He testified that the money consisted of sixty-five twenty-dollar gold pieces, current money of the United States of America, worth twenty dollars each, and that they were taken from his valise, which was behind the counter of Henry Ludwig's bar-room in the town of New Braunfels, in the county of Comal. Witness had been boarding at Ludwig's about a month, and many other persons boarded there at the same time. The defendant, the witness, and a tinner named Smith slept under an open shed which fronted the yard and stable. A public street led alongside of the yard and shed. Witness had brought the money with him when he came to Ludwig's to board, and previous to July 2, 1881, wore it around him in day-time in a buckskin bag attached to a belt, and when he retired at night it was his regular habit to take it off and put it under his head. Usually he got up about sunrise, and then he would buckle it on him again. The bed of Smith, the tinner, was within a foot or two of witness's, and was occupied by Smith every night during the period in question. There was nothing to prevent persons in the street

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or yard from seeing witness buckle the belt around him when he got up, but he usually looked to see that no one was watching him. On the 2d of July, 1881, he took the money from around him in the bar-room, where the defendant was at the time, and, putting it in his valise, placed the valise behind the counter. Defendant said it was not safe to put it there, because the place was so public, and that it would be better to put it in his room, which adjoined both the bar-room and the dining-room. Witness replied that he regarded the money as safer behind the counter of the bar-room than it would be in the defendant's room, in which two other men slept. Witness's valise and money remained behind the counter without his looking after it until the morning of the 6th of July, when Ludwig called him up to know if he had any money in the valise. Witness replied that he had thirteen hundred dollars in gold in it. After putting the money in the valise on the 2d of July, he saw it no more until about noon on the 6th of August, 1881, when August Hampe, the city marshal of New Braunfels, and Adam Seideman, a deputy sheriff, turned over to him all except one of the gold pieces. They had been found by Hampe and F. Wieman, in the presence of Henry Ludwig and his wife, Mrs. M. Ludwig. The day before that on which the money was missed, the witness told defendant that he, witness, would lend the money to Ludwig in a day or so.

On his cross-examination the witness stated that when the money was taken the defendant was barkeeper for Ludwig, but the latter and his wife were frequently behind the bar. So far as the witness knew, Mrs. Ludwig and defendant were on good terms before and after the money was stolen; and witness had never stated to the contrary. About two o'clock in a night some two weeks before the money was found, a shower of rain came up and drove witness and the defendant into the

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bar-room, where the witness by chance got hold of the key of defendant's trunk, without the latter's knowledge, and witness, about three o'clock in the night, went to the defendant's room, lighted a candle, and unlocked the defendant's trunk, which witness carefully examined. The missing money was not then in the trunk, and witness returned to the bar-room, put the key where he found it, and went to sleep. All this was done without the defendant's knowledge. Only sixty-four of the sixty-five gold pieces had been recovered by the witness.

The day before the money was found, Henry Ludwig told witness to get a search warrant for defendant's trunk, but witness did not do it. On the morning the money was found, Ludwig called Mr. Hampe, the city marshal, and told him to go into the dining-room, where defendant's trunk then was, and to shake the trunk,—that there appeared to be something heavy in it. Both Ludwig and Hampe shook the trunk, and then Hampe went off and returned, accompanied by Mr. Wieman. About a week previous, the partition between the dining-room and the defendant's room was removed, and both became the dining-room; and the defendant's trunk was left in the room. Witness had told Ludwig, Schoener, and many others that he had this money to lend, but never told anyone where it was. Defendant, however, as already stated, saw witness put it in the valise on the 2nd of July. Defendant knew that witness had the money, and was the only person who learned from witness where it was. Witness was seventy-one years old, and the money stolen was all the money he had.

Henry Ludwig, for the State, testified that the defendant was in his employ as barkeeper at the time Wucherer's money was taken. Witness was keeping a hotel and a bar-room in connection with the hotel. When the money was missed, July 2, 1881, a great many persons were boarding with witness. The dining-room door led into

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the street, and was always kept open. Wucherer had been boarding with witness about a month when the money was lost, and at different times had told witness that he, Wucherer, had twelve or thirteen hundred dollars to lend, but had never told witness where the money was kept. Having observed the valise behind the counter, witness asked the defendant whose it was, and the latter replied that it belonged to Wucherer. The morning the money was missing, the defendant called witness about an hour earlier than the former usually got up, and they immediately went into the bar-room. This was about an hour before day. Defendant, when he called witness, said that there was something wrong in the bar-room,—that one window had been broken open, and that the money drawer was on the counter. Witness saw that old man Wucherer's valise was spread open. Some old clothes were on the floor, and there was no money there. Not knowing whether there had been any money in the valise, witness went and asked Wucherer about it. Witness afterwards discovered that his own watch and chain, and five or six dollars in small change, had been taken out of the money drawer, and they were afterwards found in the defendant's trunk. Witness was present when Wucherer's money was found. Witness called in Mr. Hampe, the city marshal, and requested him to shake the trunk, because witness believed the money was in it. Both witness and Hampe shook the trunk, and the latter went off, and in less than an hour returned with the key to it. Hampe unlocked and opened the trunk, and, in the presence of Wieman, and of witness and wife, searched it, and in the upper tray found a buckskin belt, wrapped up. Hampe felt but did not then open the belt. Leaving the trunk in Mrs. Ludwig's room and charge, Hampe went off and about noon came back with a search warrant, which he executed by searching the trunk in the presence of witness and wife, Wieman, and Seideman, a

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deputy sheriff. In the trunk were found sixty-four twenty-dollar gold pieces, some silver change, and witness's watch. After Wucherer's money disappeared, the witness noticed that when he and Wucherer talked to each other, the defendant would approach them and listen to what they said. During the day on which the money was missed, the defendant was frequently running to the water-closet, and said he had the diarrhœa.

On his cross-examination, Mr. Ludwig stated that the defendant's monthly employment expired with the 5th of August, and witness had told him he wanted him no longer. He did not stay at witness's that night; but was at the bar-room the next morning between six and seven, and a second time about nine o'clock, when he was under the influence of whisky. His clothes were muddy, and he did not have his watch and chain on him. Mr. Randall (defendant's witness) was also there. This witness Ludwig denied that he had testified before the examining court that it was daylight when the defendant awoke him the morning the money was missed.

August Hampe, for the State, testified that on August 5th, 1881, he then being city marshal of New Braunfels, some one reported to him that the defendant was at Halm's bar-room, drunk and making a disturbance, in violation of a city ordinance. Witness went at once and found defendant lying on the floor of Halm's bar-room, and kicking and striking like a drunken man. With the assistance of two other men, witness carried the defendant into Halm's corn-crib, and fastened the door of the crib so that he could not get out. Counsel for the State asked the witness to tell the jury what the defendant said during the interim between his removal from the bar-room and his confinement in the crib. Counsel for the defense objected, on the ground that the inquiry called for statements made by defendant when he was in arrest. The witness was then interrogated specially upon the inquiry

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whether the defendant, during the time in question, was in arrest. The witness testified that he did not consider the defendant under arrest when taken from the bar-room to the crib. Witness took the defendant as he would a friend. "I suspected defendant of having stolen the money, and defendant knew I suspected him. I took charge of the defendant at the bar-room, as aforesaid, in my capacity as city marshal of the city of New Braunfels." The court overruled the defendant's objection, and admitted the proposed statement; and thereupon the witness testified that the defendant, during the interval in question, exclaimed, "Oh! kill me, Hampe; I am lost any how." The defense excepted to the ruling of the court admitting this testimony.

After leaving the defendant in the corn-crib, witness went to Ludwig's, who showed defendant's trunk to witness, shook it and told witness to shake it. Witness shook the trunk and felt some heavy thing knock against the top of the trunk. It was then about nine o'clock, A. M., and witness went at once to Mr. Wieman, and asked him for defendant's trunk key, which, as witness had learned, had been taken by Mr. Wieman from the defendant that morning when the latter was at Wieman's shop, drunk. Witness came back to Ludwig's, accompanied by Wieman, and took the key and unlocked the defendant's trunk in the presence of Wieman, Ludwig and Mrs. Ludwig. The trunk was then in Ludwig's dining-room, and no search warrant had then been obtained. Searching the trunk, witness found in its top tray a buckskin belt, wrapped up, and putting his hand on it, felt in it what he took to be money. Without opening the belt, he took the trunk up to the private room of Ludwig and wife, and told the latter to watch it until he came back. Then the witness, though he had no warrant for defendant, went to the crib where he was fastened up, and with assistance took him to the city calaboose, from which he was subse-

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quently taken to jail by a deputy sheriff. Defendant had not been at large since he was taken by the witness from ~~Hampe's~~ bar-room. After defendant was put in the calaboose, a search warrant to examine his trunk was obtained, and witness, with Wieman, deputy sheriff Seideman, and Ludwig, went to the room in which the trunk had been left, searched it, and found the money rolled up in a buckskin belt. There were found in the trunk sixty-four twenty-dollar gold pieces, a silver watch, and some small change in silver. By this witness, Hampe, the date of these transactions is given as the 5th of August, 1881, but other witnesses give the 6th as the date.

Mr. Wieman, for the State, testified that about seven or eight o'clock of August 6th, 1881, the defendant, at the hotel, asked witness to lend him a pistol, as he intended to kill Henry Ludwig, Matilda Ludwig, and Andreas Wucherer, because they accused him of the theft of Wucherer's money, and because Mrs. Ludwig was always quarreling with him about it. Witness refused to lend him a pistol, and he remarked that he would buy one. Later in the day witness again saw the defendant at the hotel, who then had a pistol with which he said he would kill the persons already named. About half an hour afterwards the defendant was in witness's shop, drunk and lying on the floor. Witness lifted the defendant up, and laid him under a tree in the yard, and took his watch, chain, money and key, for safe keeping. When witness took defendant's pistol he exclaimed "Oh Wieman! do something to me; I am an unfortunate man." Witness gave defendant's key to Hampe, the city marshal. The rest of the testimony of this witness related to the opening of defendant's trunk, and accorded with Hampe's evidence on that subject.

Mina Schroeder, for the State, testified that she was working at Ludwig's when Wucherer's money was stolen. Defendant left his trunk unlocked for about two weeks

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after that event, and after that time it was put in the dining room and placed on a barrel. The morning the money was found in the trunk, defendant, when he left, covered the trunk with a buffalo robe, locked it, and turned its front to the wall. With the testimony of this witness the State closed its evidence.

For the defendant several witnesses testified that he had been in their employ at different times within the preceding two years, and they had found him to be of good character, honest and industrious.

R. Kuykendall, for the defense, stated that from the 9th to the 29th of July, 1881, he occupied the room in which defendant's trunk stood, and noticed that it was usually unlocked.

Oswald Randall, for the defense, testified that, in the evening of August 5th, 1881, at Ludwig's bar-room he told the defendant that there was a great deal of talk going on about his being the party who stole the money. After this the defendant went home with witness and remained that night, and they talked about the Ludwigs and old man Wucherer accusing defendant of the theft of the thirteen hundred dollars. Witness said that if he were in defendant's place he would not stay at Ludwig's when they were talking about him in that way. The next morning the defendant started back early to open the bar-room, and witness, who then lived about three-fourths of a mile from town, told defendant he would bring him over in his buggy. About half past six that morning defendant came over with witness to Ludwig's bar-room, and it was not long before he had a difficulty with Ludwig about the accusation of theft. About seven o'clock, the defendant left Ludwig's, and in about an hour came back there, looking muddy and dirty as if he had been in the gutter, and was intoxicated. He did not then have on his watch, which he was wearing early in the morning. When he came in the witness said to

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him, in the presence of several others, that now was a good time to show them that he was not guilty, by opening his trunk and letting them see that the money was not in it. He felt in his pocket for the purpose (as the witness understood his actions) of finding his key to open his trunk. Witness was proceeding to tell what the defendant said about opening his trunk, but the court disallowed it, and the defense excepted.

The defense offered Henry Ludwig's deposition before the examining court, and by it proposed to contradict his testimony at bar respecting the hour at which he was aroused by the defendant, the morning Wucherer's money was missed. The court, however, excluded the deposition, and the defense excepted.

Guinn & Denman, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

HURT, J. Grosse, the appellant, was convicted of theft of the money of one Andreas Wucherer. He moved for a new trial, which being overruled, the cause is appealed to this court.

The first bill of exceptions raises the question, Was defendant under arrest when certain remarks were made by him, which were adduced by the State on the trial over defendant's objections? August Hampe, by whom the State proved these remarks, states: "I am now and have been continuously for more than three years city marshal of the city of New Braunfels. . . . I was at my brother's store and some one came and told me that the defendant was over at Halm's bar-room, drunk and creating a disturbance. I went over to the bar-room and found defendant lying on the floor, kicking and striking at every one who came near him. It is an offense

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against the city ordinance to be drunk and disorderly in a public bar-room. I at once called on several others to assist me. We then took defendant and carried him to Halm's corn crib, and put him in the crib, and barred the door so that he could not get out. I took charge of defendant in my capacity as city marshal. I went over to the bar-room because it was my duty as an officer to attend to such things. I did not consider defendant under arrest when I took him from Halm's bar-room to the corn crib."

Whether this marshal *considered* defendant under arrest or not, he nevertheless was most evidently so. The opinion of this witness, if admissible, certainly cannot control that fact. If to summon a posse, and take a person and carry him to and place him in a crib or elsewhere, and bar the doors so that he cannot escape, does not constitute an arrest, we are at a loss to know what physical acts would. The defendant was committing an offense, and while thus engaged was taken by the officer whose duty it was to arrest him; and he (the officer) states that he took charge of defendant in his capacity as city marshal. But, be that as it may, the defendant was in violation of the law, a posse was called for by the city marshal, responded, and defendant was taken and confined. The question is not so much the intentions and opinions of the marshal in regard to the matter, but the actual situation of defendant, and he was evidently not only in actual but intentional arrest, and, if in arrest, in the custody of the marshal; and therefore his confessions, statements or declarations were not admissible.

2d Bill: The defendant offered the deposition of a witness taken before the examining court, and properly certified to, by which he proposed to prove contradictory statements by a certain witness. Counsel for the State objected because the proper predicate had not been laid. The predicate was as follows: "Defendant asked the

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witness if he had not stated, on his examination in the committing court *in this case*, that it was daylight when defendant awoke witness, the morning the stolen money was missing;" which was answered in the negative. The court sustained the objection, upon the grounds that "witness was not shown his signature nor the written examination, nor asked if it had been read to him in the magistrate's court, nor was his attention called to time or place other than as set out herein."

We are of the opinion that it was necessary to show to witness his signature and that part of the deposition in regard to which it was sought to impeach the witness. Mr. Greenleaf states this to be the rule. "A similar principle prevails in cross-examining a witness as to the contents of a letter or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, without having first shown to the witness the letter, and having asked him whether he wrote that letter." 1 Greenl. Ev. § 46. Assuming that defendant desired to introduce the deposition, the above course should have been pursued. The rule specifies letters and other papers written by the witness. We think that by analogy depositions would be included.

It was not necessary that the witness should have been asked if it had been read over to him. We are of the opinion that his attention was sufficiently called to time and place. The object of the rule requiring the predicate is that the witness sought to be impeached should be informed of the transaction or conversation. This is usually done by citing the time and place, and naming those present; but it certainly cannot be doubted that the witness was informed of this matter by the predicate laid in this case. This charge had been inquired into by an examining court. The witness knew whether he had

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been a witness or not; if he had, certainly the time, place and presence could not have furnished additional information. If the deposition was not in fact read over to the witness, this could have been shown; not, however, to prevent its introduction, but to be considered in connection with any explanation made by the witness.

Of course the impeaching party must show that the witness signed the deposition or made his mark thereto. This is necessary when it is attempted to use the deposition. If, however, the deposition has not been signed, or if it has not been properly authenticated, still the witness can be impeached by proving what was sworn by him, and if material and in conflict with his evidence on the final trial, this course would be permissible though the deposition be inadmissible.

The third and fourth bills raise the same question, which is: Has a party the right, the other party having closed its evidence, to recall an opposing witness for the purpose of laying the predicate to impeach the witness? The court below held in the negative, and gave these reasons: "The defendant had ample opportunity to lay the predicate on cross-examination when the witness was introduced by the State, but when the State closed, and defendant sought to do this, after stating that his object in putting him on the stand was to try to impeach him, I would not permit it." Unless there were some indication of a disposition on the part of counsel for defendant to trifle with the court, or unnecessarily to consume the time of the court, this should have been allowed. Notwithstanding this matter may be in the sound discretion of the court below, the discretion may be abused. With what perfect ease could these indications be shown in the record. This, however, by the way; for we are not left in the dark as to the reason actuating the court in refusing to permit defendant to recall the witnesses.

We cannot concur in the action of the court below

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based upon the reasons given. How frequently is it the case that counsel is not aware of the contradiction until after the opposite party has closed. It is no answer to reply that defendant knew. How many litigants know of the necessity of a predicate at all? Again, the most painstaking, cautious and learned counsel often forget to lay the predicate, or the proper predicate. We know that after both sides have actually closed the evidence, they may hesitate and consult before announcing the fact. We will not pursue this subject further than to cite the case of *Treadway v. State*, 1 Texas Ct. App. 668. In the *Treadway* case the reason assigned by the judge was because, if defendant recalled the witness, he would make him his own witness, and that he would not be allowed to impeach his own witness. In the case before us the reason given is that the State had closed, and that defendant had the opportunity of laying the predicate in his cross-examination. This, we think, is directly in conflict with the Code upon this subject. If the due administration of justice requires it, either party has the right to introduce evidence at any time before the argument is concluded; and if they have the right to introduce evidence, certainly they have the right to lay the predicate for its introduction.

We will consider one other matter complained of by the appellant. The eighth bill informs us that the district attorney in the close stated to the jury, over objections of defendant, that "he heard, while out on the street in New Braunfels, a citizen remark that it was a great shame that the *defendant* should have taken the money of the old man Wucherer, near seventy-one years old, and all the money he had in the world." The court overruled the defendant's objections and allowed the district attorney to repeat these remarks, and gives this explanation: "The district attorney used the remarks by way of argument, and the facts were testified to besides,—that is,

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that Wucherer was seventy-one years old, and it was all the money he had." We cannot conceive how these remarks could be termed (as applicable to a legal trial) argument. An argument, it is true, is "a reason offered in proof, to induce belief, or convince the mind." A person on the street believed that defendant stole an old man's money, and thinks it a shame; therefore the minds of the jurors should be convinced that defendant is guilty.

If this is legitimate the crowd, which in some cases is a mob, should be consulted, and its decision reported to the jury, and the verdict should be rendered by this outside tribunal, if approaching unanimity, and be substituted for that of the jury. Who would be willing thus to be tried, or who would be willing for a jury to pass upon his guilt, their minds being first filled with the opinions of the streets, frequently manufactured by ignorance or prejudice, if not malice? This would not be a trial but a seriously solemn mockery of the same. A citizen is vouchsafed a fair and impartial trial by a jury of twelve men. Rules are given by which the jurors are tested, under oath, touching their relationship, prejudices, and opinions. When an impartial jury is impaneled, the guilt of the accused is tried under the law and evidence. The evidence consists of facts sworn to by witnesses. The witnesses must confront the accused. Hearsay evidence (facts) is not admissible; neither, *a fortiori*, are street opinions. The fact that there was evidence that the prosecutor was aged, and that he lost all of his money, had no connection with, nor could it justify, the allusion to outside opinions. The court should have promptly stopped the district attorney, and informed the jury that they should disregard these opinions, and try the defendant by the facts sworn to by the witnesses.

The refused charges, we think, are obnoxious to the objection of being upon the weight of evidence. They present a case much more restricted than that indicated

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by the evidence. *All* the facts constitute the case, and not a part.

For the errors above noted, the judgment is reversed and the cause remanded.

Reversed and remanded.

T. J. HILL AND ANOTHER v. THE STATE.

1. JUDGMENT.—The requisite of a final judgment of conviction prescribed in the ninth clause of article 791, Code of Procedure, to wit, that the defendant “is adjudged to be guilty of the offense as found by the jury,” has special if not exclusive application to felony cases. It does not apply to a misdemeanor conviction in which the punishment assessed is only a pecuniary fine, because article 803 of the same Code enacts that in such a case the judgment of conviction shall be that the State “recover of the defendant the amount of such fine and all costs of the prosecution,” etc.
2. FORNICATION — CHARGE OF THE COURT.—In a trial for fornication the court charged the jury that “every person is presumed to be innocent until his or their guilt is established by legal testimony; but if the proof in cases like this shows that the defendants did live and sleep together in the same room, and had for a series of months, it is strong evidence against the accused.” *Held*, that this was a flagrant charge upon the weight of the evidence, and is error for which this court has no option but to reverse.

APPEAL from the County Court of Fayette. Tried below before the Hon. J. C. STIEHL, County Judge.

The conviction in this case was had upon an information by which the appellants, T. J. Hill and Ellen Moore, were charged with fornication. The punishment assessed by the jury was a fine of \$50 against each of the defendants.

W. H. Ledbetter, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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WHITE, P. J. A motion is made by the assistant attorney general to dismiss the appeal in this case, for want of a proper final judgment, the defect being that the judgment does not come up to the requirements of the 9th subdivision of art. 791, Code Crim. Proc., defining the constituents and requisites of a final judgment, and requiring that it shall recite, in case of a conviction, "that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury."

It seems that article 791 has special if not exclusive reference to felony cases; at all events it is not made requisite to judgments in misdemeanor cases where the punishment assessed is a pecuniary fine only. For in article 805 it is provided that "when a punishment assessed against a defendant is a pecuniary fine only, the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid," etc. The judgment in this case is in substantial compliance with this latter article, and the motion to dismiss the appeal is overruled.

Having been submitted on its merits, subject to the motion to dismiss, the judgment in this case will have to be reversed for error in the charge of the court. Defendants were prosecuted for fornication. Amongst other things, in the last paragraph of the charge the court instructed the jury that "every person is presumed to be innocent until his or their guilt is established by legal testimony; but, if the proof in cases like this shows that the defendants did live and sleep together in the same room, and had for a series of months, it is strong evidence against the accused." This instruction was directly on the weight of evidence, and as such is expressly prohibited by statute. Code Crim. Proc. art. 677.

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An exception was duly saved by bill to this charge, and it is assigned by defendants as error. We have no option in the matter.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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J. W. M. LONG v. THE STATE.

1. **CHARGE OF THE COURT.**—ALIBI, equally with any other defense interposed to a prosecution, when the evidence tends to support it in any degree, is the subject of explanation by charge, and the refusal of a proper charge thereon is error.
2. **SAME — EVIDENCE.**— See this case for circumstances under which it was proper for the court to admit evidence of the defendant's possession of other animals at the time he was found in possession of the animal charged to be stolen, but whereunder the court should have explained the legal effect of such evidence.

APPEAL from the District Court of Guadalupe. Tried below before the Hon. E. LEWIS.

The conviction was for the theft of a cow, the property of Charles Gaebler, on the 3d day of April, 1881. The punishment assessed was a term of three years in the penitentiary.

Charles Gaebler testified that he lived at Yorktown, in DeWitt county. In the spring of 1881 he was notified by the sheriff of Guadalupe county that the latter had some cattle in his charge at Seguin, in said county. In company with Messrs. Friar, Raeder, Edwards and House, the witness went to the herd and found his cow, the animal in controversy, and recognized her by flesh-marks and the brand F. G. This animal ranged in DeWitt county between Salt and Tumlinson's creeks. The witness saw her on the range about two weeks before he found her in the herd. He did not know who stole or drove her off, but had given no one permission to do so.

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Alf. Friar testified, for the prosecution, that he lived about fifteen miles distant from the witness Gaebler. The witness found some of his own and some of Edwards's cattle in the herd in Guadalupe county. (This evidence was objected to by defendant.) The witness, with Gaebler and others, got back to their range on Salt creek in De Witt county, from the herd in Guadalupe county, about May 5th. All the parties who recovered cattle from the herd had cattle running on the Salt creek range. During the month of April, 1881, one or two men could have gathered forty or fifty head of cattle on the Salt creek range in thirty minutes.

The testimony of L. E. Edwards, for the prosecution, was identical with that of the last witness, except that he stated in addition that he did not see the defendant in the Salt creek neighborhood during the month of April, 1881.

J. V. Reader's testimony, for the State, was corroborative of that of Friar in its entirety, he being one of the party present when the animal was recovered from the herd. It would, according to this witness, take two days to drive forty or fifty head of cattle from the Salt creek neighborhood to Seguin, driving in the day-time, but they might be rushed through in twenty-four hours.

George Porter, for the State, testified that he lived with Mitchell Caraway in Guadalupe county. He spent one night, during the spring of 1881, at Marsh. Newsom's, and on that night three men penned a herd of forty or fifty cattle at Newsom's, and camped for the night. The cattle were being driven towards Seguin, where this trial was had. One of the men called the other "Marcus Tyler." The witness could give no general description of the men as he saw them on the occasion referred to, but concluded his testimony by declaring that he could not be mistaken in asserting that the defendant was one of the men he saw with the cattle at Newsom's.

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Mitchell Caraway testified for the prosecution that, on the morning after the last witness spent the night with Newsom, he saw three men pass his house, driving a herd of forty or fifty cattle, and he believed that the man Marcus Tyler was one of them. The witness subsequently saw this herd of cattle going back in the direction from whence they came, in charge of a party of men of whom one was the witness Edwards.

Lewis Carter saw a herd of forty or fifty cattle in April, 1881, going towards Seguin on the route indicated, in charge of two or three men, none of whom he recognized; and saw the cattle afterwards returning in charge of Edwards and others.

S. Anderson testified that, in April, 1881, at another point on the route he saw such a herd of cattle as that described, in charge of three men, none of whom he knew. The herd included a brown cow branded G. F. or F. G.; the witness thought the latter was the brand. None of the men were dressed as the defendant was dressed on this trial. Subsequently the witness saw the same herd returning in charge of Friar and others. One of the men having charge, going towards Seguin, rode a bay horse, another a brown, and the third rode a bay and led a sorrel, or rode a sorrel and led a bay.

J. A. Martin, railroad agent at Seguin, testified that two men came to the depot in April, 1881, and purchased tickets to San Antonio, but he did not know that these men were defendant and Tyler. After they left on the train, the witness saw two horses hitched near by, and found two saddles in the wareroom. Mr. June Coopender told the witness that one of the horses belonged to a man named Tyler, but did not mention Tyler's given name. The two men returned in a few days, got their horses, and rode off with June Coopender.

The date of the occurrence of a heavy storm was important in fixing a material question of time in this case,

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and this was shown by the weather record of a witness to have occurred on the night of April 20, 1881.

The sheriff of Guadalupe county testified that, during the month of April, 1881, he found a herd of forty or fifty head of cattle loose on the range, in Guadalupe county; that he did not know how they got there, nor did he know of anyone who did. He afterwards ascertained that they were turned loose there on the night of the storm, or afterwards. On the morning after the storm he found two horses and two saddles at the depot. He wrote to the sheriff of De Witt about the cattle, and on the first Saturday in May they were turned over to the parties from De Witt previously named. Some of the cattle were branded F. G.

Wm. Miller, an employee about the depot, testified that, on the morning following the storm, two men left two saddles with him, and two horses tied near by. He did not then know, nor has he since known them. In reply to the witness's inquiry about the horses, they said that June Coopender would come and get them. When the men returned next day they started towards town, met June Coopender, and turned back.

June Coopender testified for the State that he was directed by the sheriff to take charge of the herd of cattle, and did so. He did not know how they got to that range. He saw them before the storm, and no one was then in charge of them. He got the horses at the depot on the day following the storm, being the 20th of April. He did not see the saddles. Tyler was a witness in a case in San Antonio which was set for the 18th. The witness heard that it had been continued, and expected the return of defendant and Tyler on the train on which they came. The witness took their horses to the depot but once,—on the day of their return from San Antonio. He did not hear either defendant or Tyler say anything about bringing the cattle to Seguin. The defendant and Marcus

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Tyler drove thirty or thirty-five head of cattle to Seguin; ten or fifteen of which the witness bought. Those he purchased had been inspected.

Joe Sitterlee testified for the State that Tyler was a witness for him in his trial pending in San Antonio. He had never talked to the defendant about being a witness in the case. The witness, on his return from San Antonio, on the 19th or the 20th day of April, met the defendant at Marion, *en route* to San Antonio, and from conversation with him got the impression that he took some cattle with him to Seguin, when he went there with Tyler to go to San Antonio. Witness could not, however, remember the language of the defendant on that occasion.

The testimony of one witness authorizes the inference that he had been sworn in a previous proceeding against the man Marcus Tyler concerning the same cattle.

The defense relied upon was an *alibi*. It was shown by several witnesses that, during the month of April, 1881, the defendant lived and was a cropper on M. A. Tyler's place, near Riddleville in Karnes county. W. O. Hutchison testified that he saw the defendant at witness's house on the 1st day of April, and at church in Riddleville on the 3d day of April; and witness was at his home continuously from the 1st to the 15th days of April, 1881, and at no time saw defendant in possession of any cattle to which he was not entitled.

Tom Newman testified that a dancing school was in progress in the neighborhood of Tyler's during April, 1881, commencing on the 1st, and continuing three weeks. During the first week it met on Mondays, Tuesdays and Wednesdays, and during the second and third weeks on Mondays, Wednesdays and Fridays. The witness saw the defendant in attendance every night except the first two. During this time he saw him often in the day time at Tyler's, and once in Riddleville.

Sonny Newman testified that he saw the defendant at

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Hutchison's on the 1st of April, at Tumlinson's on the 7th of April, and on the 12th of April *en route* to Cuero, from which place he returned on the 15th, and also saw him afterwards, but could not remember the dates.

John T. Tyler saw the defendant at church on the third Sunday in April, 1881, and saw him again on the 18th day of April, at twelve o'clock, when he left witness's house going to San Antonio as a witness.

M. A. Tyler testified for the defense that he sent the defendant to Cuero on April 12th; from which place he returned on the 14th. The defendant lived with the witness, and was seen by him at his house continuously until the trip to Cuero. The witness went to San Antonio on April 16th, as a witness in the Cox, Ryan and Sitterlee case, and reached Stockdale on his return on April 19th, the night of the storm. The defendant reached home from San Antonio on April 23d.

Others testified to seeing the defendant about the neighborhood of Riddleville from the 1st of April until the 18th, at intervals. Mrs. Tyler stated that she saw the defendant about her house, where he lived, almost every day and night during April until he and Marcus Tyler went to San Antonio as witnesses, on the 18th, except during his absence at Cuero extending from the 12th to the 18th. Defendant and Tyler took no cattle with them when they went to San Antonio.

June Coopender testified that the defendant and Marcus Tyler drove a bunch of more than twenty head of cattle to Seguin during the spring of 1881; some of them were branded M. T. Of these the witness purchased a number.

Eckford & Newton, for the appellant.

Horace Chilton, Assistant Attorney General, for the State.

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HURT, J. Appellant Long was convicted of the theft of a cow.

Alibi was the defense, and it was very strongly supported by the evidence. A charge upon this defense was requested and refused; to which ruling the defendant excepted. This was error; for, by a long line of decisions, the law applicable to every defense presented by evidence, whether strongly or feebly supported, must be given in the charge to the jury. *Alibi* is an attack upon guilt and hence a defense; and the rule requires its presentation in the charge. It is not only proper, but, being a defense, it is the imperative duty of the court below to explain its nature and character by a direct charge thereon. *Deggs v. State*, 7 Texas Ct. App. 359; *McGrew v. State*, 10 Texas Ct. App. 539.

The court, over objections of defendant, permitted proof that other stolen cattle were in the bunch with which the cow charged to have been stolen was driven to Seguin. In this there was no error, in view of the peculiar facts of this case. The most difficult thing on the part of the prosecution was to connect defendant with the possession of the cow charged to have been stolen. To do this it was necessary to describe and identify the herd with which she was when taken to Seguin. To do this, evidence that other cattle from the same range were taken at the same time was proper. Some of the State's witnesses were able to identify the herd, but not the cow in question; others the herd; and stated the fact that the cow charged to have been stolen was with it. The herd being thus identified, the State attempted to connect the defendant with it (the herd); thus showing his connection with or possession of the animal charged to have been stolen. We are of the opinion that under the circumstances of this case these facts were admissible; but most evidently it was the duty of the court to have informed the jury of the purpose for which this evidence had been admitted.

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The other errors or irregularities complained of will not be passed upon; for it is not probable that upon another trial the questions will again arise. The court erred in refusing to give the charge requested upon the defense, to wit, *alibi*; for which error the judgment must be reversed.

The defendant did not request a charge upon the purpose of the evidence tending to show other offenses.

The judgment is reversed and the cause remanded.

Reversed and remanded.

MARCUS TYLER *v.* THE STATE.

1. EVIDENCE that a third party, at a given time and place, but not in the hearing of the defendant, told the witness that one of the men in charge of a drove of cattle "was a Tyler" (defendant's patronymic), was hearsay, and not admissible. If the third party had spoken to defendant by name or called him by name, and had been heard by the defendant, a different rule might apply.
2. SAME.—A witness cannot, it seems, be permitted to testify as an expert as to the length of time which would be required to gather a certain number of cattle within the limits of a given "range." He may testify, however, as to the topography of the country, the number of cattle frequenting it, and whether they were wild or gentle, leaving the question of time to the jury for determination.

APPEAL from the District Court of Guadalupe. Tried below before the Hon. E. LEWIS.

This is the companion-case of *J. W. M. Long v. State*, ante, p. 381, the indictment being for the same offense,—the theft of a cow. Upon substantially the same evidence which in Long's case is reported in full, the defendant was convicted, and awarded a term of four years in the penitentiary.

Eckford & Newton, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

Opinion of the court.

HURT, J. The appellant and one J. W. M. Long were indicted separately for theft of cattle, it being, however, for the same transaction, and the evidence in both cases being in the main the same. In this, as in the Long case, the court below refused to charge on *alibi*. This was error; see the opinion in that case, and authorities therein cited.

There is an error fatal to this judgment not presented in the Long case. By the ninth bill of exception it appears that the State asked Texas Dimmitt, a witness for the State, "If, at the time he and Cochran saw the cattle near Goodrich's falls, in Guadalupe county, Cochran called the name of either of the men with the cattle, not within hearing of defendant, and witness said 'yes, Cochran said one was a Tyler.'" This was clearly hearsay. If Cochran had spoken to defendant by name, or called his name, and it had been heard by Tyler (defendant), we will not say these facts could not be proved by the State. But the record shows that the remark of Cochran was not within hearing of defendant, and hence it was clearly inadmissible.

Again: by the 5th bill we learn that the State proved, over the objections of defendant, the length of time it would take to gather forty or fifty head of cattle in the Salt creek range, from which the cow was taken. We doubt the admissibility of this evidence. The witness should have been permitted to testify as to the topography of the country and the number or quantity of cattle, whether wild or gentle, running in that range; and let the jury draw the conclusion. These facts being shown, the jury was as competent to judge of this matter as the witness thus sought to be made an expert.

For the errors above noted the judgment is reversed and the cause remanded.

Reversed and remanded.

Syllabus.

FRANCISCO CASTENADA *v.* THE STATE.

BURGLARY — CHARGE OF THE COURT.— In a prosecution for burglary with intent to commit theft, it is incumbent on the court to give in charge to the jury the law of theft, as well as that of burglary.

APPEAL from the District Court of Cameron. Tried below before the Hon. J. C. RUSSELL.

The indictment charged the burglarious entry of the store house of D. Barreda, and the theft therefrom of two pairs of boots. The verdict of guilty assessed the defendant's punishment at two years in the penitentiary.

J. C. Scott, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was indicted for the crime of burglary with intent to steal. The judgment will be reversed for failure of the court to charge the jury upon the law of theft. When burglary is charged to have been committed with intent to commit theft, or to *steal*, the law of theft as well as that of burglary should be given in charge to the jury. *Simms v. State*, 2 Texas Ct. App. 110.

Reversed and remanded.

11b	390
30	585

11b	390
34	489

J. J. CONN *v.* THE STATE.

1. **CHARGE OF THE COURT.**— However correct a principle of law may be in the abstract, it is error to give it in charge when there is a total want of evidence to support the phase of case to which it is applied. See the opinion *in extenso* for a discussion of the rule, and this case for an example.

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2. **SAME — PRACTICE.**— If the jury after retirement desire further instruction upon a question of law, they are authorized to appear before the court in a body, and ask through their foreman, either verbally or in writing, such additional instruction; and if the subject-matter of the requested charge be proper, the court has no option but to give it, which it must do in writing. If the subject-matter be improper, the court should so inform the jury in writing.
3. **SAME — CASE STATED.**— After being out from 10 o'clock P. M. until 3 o'clock P. M. on the next day without agreement, the jury came into court, and their foreman handed a written paper to the judge. The record does not disclose what was written on the paper. To this the judge replied verbally, "I can answer your communication, but I don't think it proper. I covered the point in my charge." The court then proceeded to say to the jury: "There is another case here that cannot be tried until this is decided. It is ruining. The State pays you two dollars a day, and unless you decide, I will keep you here until Monday morning." To this entire proceeding the defendant excepted. *Held*, that the exception was well taken; that the contents of the paper should have been disclosed by the court, and that the statements of the court to the jury were improper.
4. **PRACTICE — PRIVILEGE OF COUNSEL.**— See the opinion in this case for an instance of a breach by counsel of the privilege of discussion, wherein the court should have interfered.
5. **SAME — SEVERANCE.**— The right to sever and place his co-defendant on trial, and to use him as a witness, if acquitted, is a right guaranteed to every one accused of crime.
6. **SAME — EVIDENCE.**— The witness on the stand manifesting no disposition to evade frank, plain and pertinent answers to questions propounded, the fact that he was related to a co-defendant, who was not on trial, did not authorize the prosecuting attorney to propound leading questions.
7. **EVIDENCE.**— See evidence *held* insufficient to sustain a conviction for theft.

APPEAL from the District Court of Guadalupe. Tried below before the Hon. E. LEWIS.

The defendant, and Collins and Thomas were jointly indicted for the theft of two yoke of oxen, from two different owners. Upon the application of Collins, a severance was had and the defendant placed upon trial.

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He was convicted, and awarded a term of two years in the penitentiary.

James Hutchison was the first witness for the State. He testified in substance that he, Henry Hutchison and Jack Jackson each lost a yoke of oxen in July, 1880. The witness worked his oxen on a Thursday in that month and turned them out, and they were last seen on the following Saturday, near a spring two miles distant from the witness's house. Henry Hutchison, Jackson and the witness searched for the animals and did not find them, nor did they recover them until each had offered ten dollars reward for their recovery. Mr. McCoy found them, after they had been gone three weeks, in the possession of Mr. Richter, in Flatonia, Fayette county, Texas. The witness had not given the defendant or other persons his consent to take the animals. One was branded X.

Henry Hutchison testified, for the State, that he lost a yoke of oxen at the same time the first witness lost his. They were last seen near the spring spoken of by the first witness, on the Saturday alluded to. One was branded J. H. 7, and the other C. Z. One was a deep red and the other a pale red.

C. McCoy, for the State, testified that the two Hutchisons and Jackson hired him to search for the stolen animals. He found them about five miles below Flatonia, in the possession of a man named Richter. Two of the animals were branded 7. H., one X., and one Z. C. He left them at Richter's until he brought the Hutchisons and Jackson, who proved the animals, and then took them home.

Jack Jackson testified to the ownership of the property taken from him. He went with the Hutchisons and recovered them from Richter. All the cattle ran together, and were last seen, before the theft, on Saturday or Sunday.

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James Shuler, who lived about five miles from Gonzales, testified that he heard of the theft of the animals either going to or returning from Flatonia. He saw Collins, whom he knew, and another man whom he did not know, near Flatonia. Collins's companion resembled the defendant, but witness could not recognize defendant as the man.

The witness Nelms, in July, 1880, saw three men driving six or seven head of oxen towards Flatonia, but did not recognize the defendant as either of them.

John Nelms testified that he lived in Gonzales county, about five and a quarter miles from the county seat. On one Thursday morning in July, 1880, about daylight, he saw three men driving three yoke of oxen up a hollow which ran between the house of witness and that of a neighbor. Collins came up to the witness and got some matches. The witness had never seen the defendant Conn, to know him.

Wm. Miller testified that Collins and Conn ate breakfast at his house early on the morning on which the cattle were sold at Cobb's. This was early in the morning, for which reason he surmised they camped near his house the night before. Cobb lives one mile east of the witness.

Bom Key testified that he saw the defendant and Collins in July, 1880, at Wm. Cobb's. He rode with them the distance of a half or three quarters of a mile before they reached Cobb's. This was on Saturday. They told him that their names were respectively Collins and Conn, and that they lived near Leesville. When the party got near Cobb's, Collins said he would go up to the house and get water or a watermelon. Cobb at that time was at his pen near his house, in company with his brother and another man who had charge of the oxen. Wm. Cobb asked if the witness did not want to purchase the oxen, saying that he would sell them cheap. The witness responded in the negative, and Collins asked Cobb the price at which he held them. Cobb replied that his price was

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\$100, and Collins said he believed he would take them, as there was money in them at that price, and asked if the man in charge had a bill of sale to them. The man responded in the affirmative, and exhibited his bill of sale. Collins went into the pen with the man, to examine the oxen, and on his return said to the man: "I will take the oxen, but I have not all the money; you will have to go with me to Gonzales for part of it." The man agreed, as he said he was on his way to Bee county, and Gonzales was on his route. He and Collins then went into the house to draw up a bill of sale. When they returned, Collins told the defendant to turn the oxen out, and let them graze on the road towards Flatonia until his return. Collins and the man then rode off towards Gonzales, but Collins returned within thirty minutes, and said that he had traded the man his pistol at \$15, and paid him \$85 he had with him. The witness then told Collins that he, witness, was fearful he had bought bad property; that the man had told Cobb that he brought the oxen from Black Jack Springs in Fayette county, the day before, which the witness knew was untrue, as he saw the man the day before, and he had no cattle in charge at that time. Collins asked the witness why he did not inform him before he purchased, and witness replied that he did not hear it until after Collins had gone. He then said he would overtake the man, but finally said, "No, I reckon it is all right, as he says a man owed him, and gave him the oxen to pay. I can sell them, and if they are proven away, I will have to pay for them." He then went on towards Flatonia. The defendant Conn took no part in the proceedings at the pen. He went to the house for water, and the witness did not think he heard any of the conversation about the oxen. All that he did was to drive off the oxen when told to do so. This all occurred Saturday, July 10, 1880.

Wm. Cobb corroborated Key's testimony as to the transactions at the pen, and added that he saw Collins

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and defendant going towards Flatonia, the day before, returning late in the evening; and that they informed him at the pen that they took breakfast that morning on Denton's creek; and he, the witness, wrote the bill of sale. Defendant, according to this witness, went to the house during the time the trade was being made at the pen, and took no part in the transaction, except to drive off the oxen when told to do so by Collins.

S. S. Cobb's testimony was the same as that of Wm. Cobb, with the addition that Denton's creek was seven miles west from Cobb's house. He had seen a man, the evening before, crossing the road east of his house with three yoke of oxen. The oxen had different brands, X., Z. C., J. H. 7. He also proved the bill of sale. This witness and Wm. Cobb both stated that neither Collins nor defendant seemed to know the man who sold the oxen.

According to the witness McCoy, Collins and defendant were "raised" within twelve miles of each other, but he did not know that they had ever met before.

J. H. Clayton, in answer to the State's attorney, stated that the defendant since his indictment, told him that he and Collins had been east with horses; that on their return they met a man at Cobb's from whom Cobb purchased some oxen, which he subsequently sold; that he, the defendant, was but a hired hand and had nothing to do with the trade. The witness also stated that he knew that the defendant was hired to Collins. He had been in the employ of the witness, but when his engagement expired, about the last of June, 1880, Collins hired him at fifteen dollars per month. The witness was related to Collins by marriage. The State closed at this point.

The defendant first read in evidence the bill of sale proved by Wm. and S. S. Cobb. It is as follows:

"STATE OF TEXAS, County of Gonzales.

"This is to certify that I have this day sold and conveyed unto Mr. J. F. Collins three yoke of oxen in the follow-

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ing brands: one branded X, one branded J. H., two branded F. 7, one branded J, one branded Z. C., for the consideration of (\$100) one hundred dollars, paid me in hand, this the 10th day of July, 1880.

“T. H. ^{his}
X JOHNSON.
mark.

“Witnessed by

“W. B. COBB,

“S. S. COBB.”

Collins, for the defense, testified that he was a brother of the Collins jointly indicted with the defendant. His brother lived near the witness, and if he was absent in July, 1880, for any considerable length of time, the witness did not know it.

Ireland & Burges, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Collins, Thomas and appellant (Conn) were indicted for the theft of two yoke of oxen. A severance being had (upon the application of Collins), Conn was tried and convicted. Judgment being entered upon the verdict, Conn appeals.

The first matter we will notice is the charge of the court. While it is true in law that if the accused were present, and, knowing the unlawful intent, aids, abets, assists, encourages, stands guard, etc., he would be as guilty as the person actually engaged in the commission of the offense, yet it is not always proper to give abstract rules of law in charge to the jury. There must be evidence tending to show that defendant comes within the provisions of the rule; if not, the rule is abstract, and to give it in charge without support in the facts is assuming. It tends frequently to the supposition of the existence of the facts necessary to bring the prisoner within the operation of the rule; thus making the rule self-sustaining, independent of the facts. Again this charge tends to

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impress the jury with the belief that defendant did aid and encourage, etc.; for if he did not, why charge upon this subject? It is the duty of the trial court to charge the law applicable to every phase of the case made by the evidence, or any part of the evidence, leaving the jury to pass upon the strength of the evidence; but the court should never charge a rule of law, though perfectly sound, which has *no support* in the evidence.

We have examined the statement of facts, but found no fact which can be made the basis of this charge. The only fact which can be tortured into such evidence is that, when the oxen were purchased by Collins at Cobb's in the presence of the two Cobbs, defendant was told to turn them out in the direction of Flatonía; and this he did. There is no question but that Conn was a mere hired hand, in the employ of Collins. This being the case, the evidence must tend to show guilt in Collins, and guilty knowledge in Conn in connection with the above act of driving the oxen out of the pen in the direction of Flatonía. The evidence must show that Collins was engaged in the theft of the cattle, and that Conn knew this, and that when he turned them out of the lot, he *intended thereby* to aid, encourage, or assist Collins in the theft. The act (there being nothing said by Conn) must not only aid, encourage, or assist in the theft, but such an effect must have been intended. If the natural consequence of the act tends to aid, assist, or encourage in the theft, that it was intended to have such effect is presumed.

If, however, the act isolated from the other facts was not calculated to have such effect, the evidence must show the intent with which the act was done. This may be done by the surrounding facts or circumstances. When these are looked to, they not only fail to indicate a wrong intent, but tend strongly to rebut such an inference. The oxen had been purchased by Collins at the house of Wm. Cobb in the presence of Key, Wm. Cobb

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and S. S. Cobb. A bill of sale was taken, and it was witnessed by the Cobbs, and correctly described the oxen. The trade being consummated, Collins told defendant "Go turn out the oxen, and let them graze on the road towards Flatonia." This he did, and this was all he did. This act, viewed in connection with the immediate circumstances, cannot justly be construed in a culpable light. It must be viewed in the light of these facts,—the facts *immediately attending* the act of defendant, to wit, turning the oxen out of the pen; for there is no evidence connecting defendant with the oxen prior to the sale to Collins. (The Reporters will give the evidence.) We are of the opinion that the court erred in giving the charge complained of; and we are also of the opinion that the evidence fails to support the verdict, and that a new trial should have been awarded.

Bill of exceptions No. one informs us that the cause was submitted to the jury about 10 o'clock, P. M., on the 4th of November, and that at three o'clock of the 5th, without agreeing they came into court, and presented to the court a piece of paper "containing writing," the purport and effect of which was not made known to defendant or his attorney; that the court, after reading it, said: "I can answer your communication, but I don't think it proper; I think I covered the point in my charge;" and then went on to say "there is another case here that cannot be tried till this is decided; it is ruining,—the State pays you two dollars a day, and unless you decide I will keep you till Monday morning."

Article 696, Code Crim. Procedure, enacts that "The jury, after having retired, may ask further instructions of the judge touching any matter of law. For this purpose the jury shall appear before the judge, in open court, in a body, and through their foreman state to the court, either verbally or in writing, the particular point of law upon which they desire further instructions, and the

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court shall give such instructions in writing; but no instruction shall be given except upon the particular point on which it is desired." The court must instruct upon the point presented in the request of the jury, and this must be done in writing. If not proper matter for instruction, the court must inform the jury of this fact in writing. In this instance the defendant, his attorneys, nor this court, so far as the record shows, is informed of the contents of the paper presented to the judge. From the answer of the judge thereto it evidently contained a request for further instructions upon some point. If the point was a proper one for instruction, the court was left no alternative but to respond. The Code is imperative; hence the necessity,—the absolute necessity,—of disclosing the contents of this paper. Defendant excepted to this secret, *ex parte* proceeding between the jury and the judge; and we think he had just cause to object to and protest against this very anomalous conduct.

The spirit and genius of our Codes are opposed to any and every thing which militates against a *fair, open* and public trial. No step in the *trial* can be taken in the absence of the defendant. If allowed to be done or had secretly, his presence would be a mockery,—a very serious farce to defendant. Why the judge informed the jury of the fact,—than which none was better known to each and every member thereof,—that the State paid them two dollars each per day, we cannot comprehend. Taking the facts immediately attending this matter, we find a wrong impression was made upon the jury. These remarks and all of like character are wrong, and should not be indulged in.

It appears by the 4th bill that "the district attorney said to the jury, 'They have severed and Conn is put on trial, and you are told he was only a hired hand. They hope thus to clear this man and then he is to swear his confederate clear. I tell you this is the trick.'

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To which the defendant objected, and asked the court to stop such statements; which was refused by the court. Continuing, the district attorney said, 'Good men in this county, and the best men in Gonzales county, desire the conviction of this man and his partner.' To all of which the defendant objected. The court overruled the objections, remarking, 'he speaks at his peril; I will sign your bill of exceptions.'"

Collins had the right to place Conn on trial first, and, if acquitted, make a witness of him. This is not only permitted by the Code, but is in perfect accord with reason and justice; and the judge should not have permitted for a moment, an attack, such as the above, upon proceedings which are not only just but expressly authorized by the very Code of laws for a supposed breach of which the defendant was being tried. If to place Conn on trial first, with a view of acquittal and to make him a witness, be a trick, it is one expressly provided for by law. If Conn be guilty, the State could defeat the trick by proving his guilt, under the rules of law. This response of the judge is astonishing indeed. Considering the very obnoxious and flagrant remarks of the district attorney, we cannot conceive how it were possible for any person *save defendant* to be in peril. That the district attorney was not is very evident from the fact that defendant's motion for a new trial was promptly overruled. We are left to conclude from the latter part of the remark, to wit, "I will sign your bill of exceptions," that the danger or peril was to be from the hands of this court; if so, we are equal to the occasion; for we will not permit one accused of theft or any other offense to be convicted by such means, though all of the good, better, or best men of this State desire his conviction.

We will not discuss why or how these remarks of the district attorney injure the rights of defendant. Nor will we quote authorities in condemnation of these re-

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marks, nor to show that it was the duty of the judge to have promptly stopped the district attorney, and inform the jury that they should not be influenced by the wishes of good or bad men, but that they should and must try defendant by the law and the evidence of the witnesses,—witnesses sworn in the case.

The witness James Schuler was related to Collins. The district attorney asked and obtained leave to lead, and did propound leading questions to this, the State's, witness. There was no disposition to evade or answer in a doubtful or double sense, nor was there a disposition shown not to answer frankly, plainly and pertinently each and every question propounded. This being the case, was the fact that witness was related to Collins, who, though jointly indicted, was not on trial, a good and sufficient ground to authorize leading questions? We think not.

For the errors above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

JAMES POWELL v. THE STATE.

THEFT — EVIDENCE — CONSENT.— It was in proof that the defendant, when found in possession of the stolen property, claimed possession by virtue of the consent of the owners' agent. *Held*, that it being shown that the agent was accessible at the time of the trial, and want of his consent not being in proof, he should have been produced by the State to negative, if he could, the statement of the accused. See the opinion *in extenso*.

APPEAL from the District Court of Harrison. Tried below before the Hon. A. J. BOOTY.

The indictment charged theft of goods from a store house, of the aggregate value of fifty-four dollars. The

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trial resulted in the conviction of the defendant, and the verdict assessed his punishment at two years in the penitentiary.

James Turner, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The record discloses that the appellant was tried on a charge of theft of property belonging to two persons composing a mercantile firm in the city of Marshall. One member of the firm testified to his want of consent to the taking, and that the other member was absent in the city of New York at the time of the alleged theft. He further testified that there were two young men clerking in the store at the time of the theft; that the one hereafter alluded to was in the store at the time of the trial. He further testified that he got the goods from Mr. Arch. Adams, a policeman.

Arch. Adams, a policeman, testified that the defendant, while under arrest, said the goods were at the house of his (the defendant's) mother, where the witness found them. He testified on cross-examination that the defendant first denied knowing anything about the goods, but he, the witness, took the defendant out into the back yard of the office, and told him it was best to tell all about it; he would not be hurt. The witness then says: "He then told me he did not steal the goods, but that Herman Forgetston gave them to him on services rendered."

Herman Forgetston seems to be one of the clerks employed in the store, and the defendant was employed as porter at the time of the alleged theft.

It is shown that Herman Forgetston was accessible at the time of the trial, and it is not proved that he did not consent to the taking. Under the circumstances, the State should have called him to testify as to whether or not he had given his consent to the taking; or in other words,

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to evidence, if he could, the falsity of the defendant's statement as to how he became possessed of them. The point was sufficiently reserved on the trial below.

Because of this error the judgment will be reversed and a new trial awarded.

Reversed and remanded.

FRANK ROBINSON v. THE STATE.

1. **THEFT.**— Where a proprietor has sold certain goods to be delivered hereafter, and in order to separate them from bulk pending delivery, places them in a trunk, and his agent, without knowledge of its contents, subsequently sells and delivers the trunk to a third party, who, equally ignorant of the contents, receives the trunk, takes it home and finds the goods, the *status* of the goods is that of lost property, and the relation of the purchaser of the trunk to the contents is that of finder of lost or mislaid property. See the opinion on the question.
2. **SAME.**— **LOST PROPERTY**, like any other, may be the subject of theft.
3. **SAME** — **CRIMINAL INTENT** — **CASE STATED.**— M., a merchant, sold two coats and a vest to be delivered hereafter, and for keeping placed the articles in a trunk in his store. A day or two subsequently his clerk sold the trunk to the defendant, neither of them examining it, and both ignorant of its contents. The defendant took the trunk home and there discovered its contents, which he did not return, but retained. On the trial, it was insisted for the defense, that, in order to convict for the theft of the coats and vest, the intent to appropriate them must have existed at the time the trunk was delivered and received. But *held*, that if the criminal intent was formed at the time of the discovery of the goods, their appropriation was theft. See the opinion *in extenso* on the question.
4. **SAME** — **CHARGE OF THE COURT.**— See the opinion for a charge of the court applicable to the principle, and for charges properly refused as repugnant thereto.

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APPEAL from the District Court of Parker. Tried below before the Hon. A. J. Hood.

The opinion fully states the case. The punishment imposed by the verdict was confinement for two years in the State penitentiary.

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No brief for the appellant has reached the Reporters.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. A. L. Morris, who was a dry goods merchant at Weatherford in Parker county, sold to two parties living in the country a coat and vest to one, and a coat to the other. These parties were to call, pay for, and get the articles in a few days. Meantime he placed the articles for keeping in a trunk in his store. One of his clerks sold this trunk a day or so afterwards to defendant, and neither he nor defendant examined the trunk at the time, nor did they know of its contents, but both supposed it to be empty.

Defendant bought and paid for nothing but the trunk. He carried it home and there became apprised of its contents, but did not return the coats and vest, but shortly afterwards when he moved from Parker to Johnson county, he carried the trunk and clothing with him. Morris, when he became aware of the loss of the goods, sent a deputy sheriff to Johnson county for them. Defendant at first denied to the officer that he had the articles, but subsequently, when the officer told him he was satisfied he did have them and that he might have trouble if he did not give them up, he said that rather than have any trouble he would give them up, and then went and got them and delivered them to the officer.

On the trial of defendant for the theft of the goods, the following, amongst other requested instructions asked in his behalf by his counsel, were refused by the court, viz.: "If the jury are satisfied from the evidence in this case that the property came into defendant's possession lawfully, and that at the time it so came into his possession he had no intent to steal the same, then the jury must find the defendant not guilty under the indictment."
... "If the jury are satisfied from the evidence that, at the time the defendant bought the trunk from Mor-

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ris's clerk as detailed by the witnesses, that the coats and vest named in the indictment were in the trunk and delivered to defendant, and by him carried away, he the defendant not knowing that the coats and vest were in the trunk until after he arrived at home with them, this would not be such a taking as to make it theft. To constitute theft there must be an unlawful intent at the time of the taking."

In lieu of these instructions the charge of the court as given declared the law in the following language, viz.: "If the defendant purchased and conveyed away the trunk, the said coats and vests being therein, and he the defendant at the time knew the goods were in the trunk, and he the defendant at the time further knew that the owner was ignorant of the fact that the goods were in the trunk, and such taking of the goods and trunk was, as far as the goods were concerned, without the consent of the owner and from his possession, and such taking of the goods was done with the intent to deprive the owner of the value of the same and appropriate the goods to his, defendant's, own use and benefit, then in law such taking would be a fraudulent taking. Again: if defendant bought and paid for the trunk, and neither he nor the seller knew at the time that said goods, to wit, said coat and vest, were in fact in the trunk, and if in a short time after carrying the trunk away the defendant found the goods in the trunk, and at the time, knowing the owner of the goods, formed in his mind the intention of fraudulently keeping and not restoring the goods, and if he, defendant, did under these circumstances, knowing the owner, retain the goods with intent to steal, then in such case in law defendant's taking would be a fraudulent one, and, if proven guilty of the theft in every other respect, cannot lawfully claim an acquittal on the ground that the taking was a lawful one."

Our Penal Code, in defining the legal meaning of the "taking" necessary and essential to constitute the crime

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of theft, declares that "the taking must be wrongful, so that, if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft." Penal Code, art. 727. Appellant's counsel, in the refused instructions, has sought to apply the terms of this provision literally to the case at bar. The idea conveyed is that if the trunk came lawfully into the possession of accused, all its contents came equally into his possession lawfully, and he could not be guilty of theft by a subsequent appropriation of them. This is not in fact true. The owner, or rather his clerk, whilst selling and delivering the trunk never intended to convey and did not convey either the title or possession of its contents; for he was wholly ignorant of its contents. So was defendant, when he purchased and became possessed of the trunk. The goods, so far as these parties were concerned, were lost, because they neither knew anything of their existence or their whereabouts. When defendant opened, examined and came across them in the trunk, they were in every sense lost goods which he found; as much so as if he had come across them upon the public highway or any other place where the owner had dropped, mislaid, left them by mistake, or lost them. The *status* of the case is precisely that of the finding of lost or mislaid goods, and the law governing such a finding is the law applicable to the facts of this case. There can be no serious question, either in reason or law, why lost or mislaid goods may not be the subjects of theft. It has, we are aware, been held otherwise in two cases, one in Tennessee [*Porter v. State*, M. & Yerg. 226], and one in New York [*People v. Anderson*, 14 Johns. 298], the ground assumed being that, as a trespass is not committed in taking lost goods, they are not the subject of larceny. But elsewhere both in England and America the contrary doctrine is everywhere firmly settled and established.

Mr. Bishop says: "The law gives to the finder a title

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in lost goods, but not full and unconditional; and so if he takes them with the intent to steal them he commits a larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man knowing the owner of goods cannot lawfully pick them up, without returning them to him, but a man not knowing the owner can. The doctrine, therefore, is that if, when one takes goods into his hands, he sees about them any marks, or otherwise learns any facts, by which he learns who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise not. Some of the cases say if he knows who the owner is or *has the means of ascertaining*; but the better doctrine is as above set down, because every man by advertising and inquiring can find the owner if he is to be found, while the guilt of the defendant must attach at the moment, if ever, without depending on an if." 2 Bish. Cr. L. (8th ed.) § 882.

The only distinction made between theft of lost goods and theft of other property seems now to be that at the time of the finding "the intent to steal must exist, and the finder must know or have the reasonable means of knowing or ascertaining the owner." 3 Greenl. Evid. § 159; 2 Hard's Lead. Crim. Cas. 423-432; 2 Arch. Cr. Pl. and Pr. 388-395; *Reed v. State*, 8 Texas Ct. App. 40.

The doctrine in no wise contravenes the provision of our statute that the thing stolen must be taken from the possession of the owner or some one holding the same for him [P. C. art. 724]; because the owner of lost property is not divested of his right of property in it by the loss, and that right draws to it constructively the possession wherever found. "The owner of goods need not keep a constant manual possession of them to be protected in his rights of ownership. And though he forget the place in which he laid them, or though for any other reason he knows not where they are, still they remain his." 2 Bish.

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Cr. Law, § 878. See also a very able and learned discussion of the whole subject in *Griggs v. State*, 58 Ala. 425.

But suppose in the case before us, with reference to the owner's rights, the goods should be treated rather as mislaid than lost goods, the rules so far as the taker is concerned are the same, and the taking would be theft. *Id.* sec. 879.

But let us consider the subject of fraudulent intent, which is the gist of the offense of theft under our statute. It is said that this intent must exist at the time of the taking, and that no subsequent felonious taking will render the previous taking felonious. *Billiard v. State*, 30 Texas, 367; *Johnson v. State*, 1 Texas Ct. App. 118. As we have seen, defendant did not know that the goods were in the trunk when the trunk was taken; consequently his taking of the goods at the time he took the trunk was, so far as they were concerned, an involuntary act. With regard to them at the time of taking, he did not and could not have entertained any intention at all. His intentions so far as they were concerned could only be called into exercise and have had being when he found or discovered them in the trunk, and his criminality must attach at that time if at all, since it was impossible that a fraudulent intent could have been entertained previously. If the fraudulent intent and taking did not occur then, no subsequent felonious taking would constitute the crime.

"If at the time of the finding (which was when he discovered the articles in the trunk), the felonious intent did not exist, though there may be a subsequent concealment of the goods or a denial of all knowledge of them, and a fraudulent appropriation of them, the offense is not larceny. Whether the criminal intent coëxisted with the finding is a question for the jury. It may be a question of difficulty, but it is to be ascertained by the jury just as the intent with which any act done is ascertained,—

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by a careful examination of the facts and circumstances attending and immediately following the finding. We quote from the case of *Ransom v. State*, 22 Conn. 156, as follows: "For the purpose of showing such intention, inquiries as to his, the finder's, conduct and all the circumstances preceding, accompanying or following such taking, so far as they are relevant, are, as in all other cases of similar accusation, admissible; and when the goods were obtained by finding, it is from the nature of the case very important to ascertain whether the accused knew or had the means of knowing the owner, or endeavored to discover him, or made known or concealed his acquisition; and generally how he conducted with the goods in order to determine whether he intended originally to convert them to his own use or to restore them to the owner. No arbitrary or artificial importance or effect is attached to these circumstances when they are disclosed by the evidence; they are only evidential of the intention of the accused, and as such to be weighed by the jury." See also *Griggs v. State*, 58 Ala. 425.

When the charge of the court as above quoted is subjected to the tests of the principles of law which we have discussed, we think it will be found to be substantially correct, and in the main entirely harmonious with them. On the other hand, it must be equally as apparent that the refused instructions did not embody correct principles of law. The court did not err in the charge as given, nor in the refusal of the requested instructions asked in behalf of defendant. Other questions are raised but the errors complained of are not deemed tenable.

We find no such error in the record as requires a reversal of the judgment, and it is therefore affirmed.

Affirmed.

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EDUARDO D. AND ANACLETO GARZA v. THE STATE.

MISDEMEANORS cannot be prosecuted in the County Court upon a mere complaint without an information. All offenses save such as are excepted in article 418, Code of Criminal Procedure, must be presented by indictment or information.

APPEAL from the County Court of Cameron. Tried below before the Hon. J. M. HAYNES, County Judge.

The conviction in this case was for libel. The prosecution was founded upon a complaint made by Adolphus Glaevaeke, the prosecuting witness, before the county judge, in the shape of an affidavit. There was no information based upon it. A fine of one hundred dollars was assessed as the punishment.

No brief for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. An affidavit or complaint was made before the county judge, charging the appellants with libel. No information based upon said affidavit was ever brought or presented in the County Court, and appellants were tried alone on the complaint without an information. It is true that it is provided in section 17, article 5 of the Constitution, that "Prosecutions may be commenced in said court (county) by information filed by the county attorney, or by affidavit, as may be provided by law;" but we are not aware that any provision of law has as yet been passed authorizing the prosecution of misdemeanors in the County Court simply by affidavit or complaint. On the contrary, it is expressly provided that "All offenses known to the penal law of this State must be prosecuted by indictment or information. This provision does not include fines and penalties for con-

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tempt of court, nor special cases in which inferior courts exercise jurisdiction." Code Crim. Proc. art. 418.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ALEX. GRAY v. THE STATE.

INDICTMENT for theft of cattle need not have charged them to be "work steers," but, so charging, affirmative proof that they were "work steers" was essential to a conviction. Proof to the contrary operates as a fatal variance.

APPEAL from the District Court of Comal. Tried below before the Hon. T. M. PASCHAL.

The conviction was for the theft of two head of cattle charged in the indictment to be work steers. The punishment assessed was a term of four years in the penitentiary.

The opinion sufficiently discloses the case.

Ireland & Burges, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. There was no necessity that the pleader should in his indictment have described the animals alleged to have been stolen as "work steers," but, having done so, it was a part of the descriptive identity of the animals, and essential to be proven. Having failed to prove they were "work steers," the evidence showing on the contrary they were not work steers, the variance between the allegation and proof is fatal, and the judgment of conviction must be reversed. *Warrington v. State*, 1 Texas Ct. App. 168; *Clark's Crim. Law of Texas*, p. 544 and note; *Cameron v. State*, 9 Texas Ct. App. 332.

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This disposes of the appeal, and it is unnecessary under the present indictment to discuss the other questions raised in the record. The judgment is reversed and the cause remanded.

Reversed and remanded.

W. L. JONES v. THE STATE.

APPEARANCE BOND — PRACTICE.— Plaintiff in error was surety for one S. on the latter's bond for appearance in the County Court, to answer the State on a charge of theft. Indictment was subsequently found in the District Court against S. for petty theft, but neither it nor an information was presented in the County Court at its first term after the execution of the bond, nor did the State's attorney show cause and obtain an order of court preventing the lapse of the bond, as provided in article 592, Code of Procedure. Nevertheless, forfeiture of the bond was entered in the County Court and such further proceedings had as resulted in final judgment against the plaintiff in error as surety. *Held*, that the sureties on the appearance bond were discharged from liability by reason of the non-presentment of an indictment or information against their principal at the first term of the County Court after the execution of the bond. Wherefore the judgment of the court below is not only reversed, but the cause is dismissed.

ERROR from the County Court of Fort Bend. Tried below before the Hon. J. C. WILLIAMS, County Judge.

The case is sufficiently stated in the opinion of this court.

W. L. Davidson, for the plaintiff in error.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The plaintiff in error and another were sureties for one Sweeney on an appearance bond which required the appearance of Sweeney before the County

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Court of Fort Bend county on the first Monday in January, 1879, to answer the State of Texas on a charge of theft. On June 2, 1879, this bond was forfeited and judgment *nisi* was entered against the principal and his sureties, and *scire facias* was awarded. On December 3, 1879, final judgment was entered against Jones, the plaintiff in error, the State having dismissed as to the other surety, Colson. From this final judgment the case is brought here by Jones, sole plaintiff in error.

The record contains an indictment against Sweeney, charging him with the theft of one case knife and fork of the value of fifty cents each, and one mustard cruet of the value of fifty cents, the property of one Lidke; which indictment was filed in the District Court, January 7, 1879, but which was not filed in the County Court until January 31, 1879.

There being no indictment filed in the County Court at the first term of that court, and the defendant having given the bond before indictment found, it was the duty of the prosecuting attorney, if he desired to hold the person accused beyond the first term of the court, to have shown good cause, supported by affidavit as required by article 592, Code of Procedure; otherwise the defendant and his sureties were entitled to be discharged, under subdivision 4 of article 452, Code Crim. Procedure. If the county attorney had intended to prosecute the principal in the bond, for the offense charged in the indictment, he could have proceeded on information, it being but a petty theft. If he chose to proceed by indictment, then he should have made the proper showing to hold the defendant to await the presentation of an indictment, or have caused the indictment to have been filed in the County Court at the first term of the County Court after the appearance bond had been given. Neither of these courses having been pursued, the sureties were exonerated from liability by the failure to present an indictment or an information at the first term of the County Court.

Syllabus.

The motion of the assistant attorney general to dismiss this appeal will be overruled, the grounds not being deemed well taken. The final judgment taken against the plaintiff in error will be reversed, and the proceedings relating to the forfeiture of the bond will be dismissed from the beginning. Whether the defendant can be prosecuted under the indictment presented against him is not raised in the present case. Under the circumstances disclosed by the record the appearance bond given for the appearance of the defendant cannot be enforced against his sureties.

Reversed and dismissed.

H. B. WHITWORTH v. THE STATE.

1. **THEFT—EMBEZZLEMENT.**—The Revised Code of Procedure (article 714) not only re-enacts the provision of the original Code which made the offense of theft to include all unlawful acquisitions of personal property punishable by the Penal Code, but so enlarges the offense of theft as to include within it the offense of swindling and embezzlement. Therefore, under an ordinary indictment for theft a conviction may be had for embezzlement, provided the offense was committed since the Revised Codes took effect.
2. **SAME—CONSTITUTIONAL LAW.**—Said article 714 of the Revised Code of Procedure is not violative of the constitutional guaranty that a party "shall have the right to demand the nature and cause of the accusation against him."
3. **SAME—EVIDENCE.**—On the trial of the appellant under an indictment which in ordinary form charged theft of money from one J. in the year 1890, the State offered proof that appellant was a clerk of J., and in that capacity obtained possession of the money. The defense objected that the indictment was not for embezzlement, and that it contained no allegation to which the proposed proof was relevant. *Held* that, as the offense of embezzlement is now included within that of theft, the objection was correctly overruled.
4. **SAME—CHARGE OF THE COURT.**—In the state of case above indicated it was correct for the court, in its charge to the jury, to withdraw from them the issue of theft, and to submit that of embezzlement, with appropriate instructions upon the law of the latter offense.

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APPEAL from the District Court of Erath. Tried below before the Hon. T. L. NUGENT.

The indictment was filed December 8, 1880, and charged that H. B. Whitworth, the appellant, did, on September 20, 1880, in the county of Erath, fraudulently take, steal, and carry away, from the possession of G. W. Jordan, one five-dollar United States currency note of the value and denomination of five dollars, and also two dollars of the current money of the United States, a more particular description of which was unknown to the grand jury. A trial was had during the term at which the indictment was found. The appellant was convicted, and his punishment assessed at imprisonment in the county jail for one month and a fine of \$250. The facts of the case are peculiar.

The first witness introduced by the State was Jerome Darnell, a resident of Stephenville, the county seat, and an employee of Dr. M. S. Crow. He testified that, on the night of September 27, 1880, he was in the drug-store of W. A. George in Stephenville, and in company there with said W. A. George and Dr. Crow. While there the witness received from W. A. George twenty-five dollars in money, consisting of five bills of \$5 each. Dr. Crow then directed witness to go into Jordan's store and spend the money with the defendant. Witness went into Jordan's store, which adjoins George's drug-store, and told the defendant, who was Jordan's clerk, that he wanted some goods, and, after some examination, he selected a suit of clothes, a pair of boots, a shirt, an undershirt, and three pairs of socks; the prices of all the articles aggregating twenty-two dollars. In payment, the witness handed to the defendant the five bills he had received from Mr. George, and the defendant placed them in a drawer which he drew from under the counter, and then took from the drawer some silver half-dollars to the

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amount of two dollars, and there not being enough to pay witness change, the defendant returned the silver to the drawer, and, remarking that he must get some change, took two of the bills paid him by witness, closed the drawer, and walked out of the front door of the store. In about a minute he returned and handed to witness the three dollars due him. Witness then took the articles he had bought, and carried them to his bedroom in Dr. Crow's residence, where Mr. George, Mr. Jordan and Dr. Crow examined them the next day, and they were then taken back to Jordan's store. Witness had not had any conversation with Mr. Jordan about the purchase of the goods.

W. A. George, for the State, testified that the defendant, prior to September 28, 1880, was a clerk in the store of T. R. Jordan & Co. in Stephenville. G. W. Jordan was in charge of that store on the 27th of the month aforesaid, when witness loaned him twenty-five dollars, which he requested witness to pay over to a person who would come that night to receive it. The money consisted of five bills of five dollars each, of which one was a United States currency note and the others United States National Bank notes. Each of the bills was worth five dollars. In company with and assisted by Dr. Crow, witness had, the same evening, put a mark on each of the same bills, to enable them to identify each bill; and before they were given to Jerome Darnell each of them was carefully examined by Dr. Crow and witness for the same purpose of subsequent identification, and witness took a memorandum of each one of them. The day after these bills were delivered to Darnell, G. W. Jordan brought three bills to witness, who, on examining them, found them to be three of the five bills delivered to Darnell the previous night. Soon after Darnell got the money witness saw him go towards Dr. Crow's residence, with some bundles, and the next day the witness went

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there with G. W. Jordan, who recognized in some bundles a suit of clothes, a pair of boots, and some other goods as articles which had come from his store, and either he or Dr. Crow carried them back to the store. During the same day, September 28th, witness, while standing near the front door of Jordan's store, heard a conversation going on inside the store between Jordan and defendant, and distinctly heard defendant say "the devil must have been in me." One Barkley was also standing outside the store at the time. That night witness went with Jordan to defendant's house, for the purpose of witnessing defendant's signature to a deed. Defendant was found holding his horse by the bridle, and the horse was saddled. He never transacted business for Jordan after that day.

Dr. Crow was also introduced and examined by the State. Nearly all the facts stated by him appear in the testimony of the two preceding witnesses. He stated that it was an understanding between him and Jordan that the goods were to be returned to the store. On cross-examination he said that he and defendant spoke to each other when they met; that he had prosecuted defendant for embezzlement, several years previously, and they had not been intimate with each other since, though witness could not say they were unfriendly. "We are on tolerably good terms considering the circumstances," was the concluding remark of the witness.

G. W. Jordan, for the State, testified that on September 27, 1880, he, as the sole managing partner of the mercantile firm of T. R. Jordan & Co., was conducting a grocery and dry goods business in the store-house at Stephensville known as the Whitworth & Brumly building. At that date and for about fourteen months previous, the defendant was in the employ of the firm as a clerk, book-keeper and salesman, with authority to collect claims and transact the general business of the firm. On the said

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27th of September, witness borrowed twenty-five dollars from W. A. George, and requested him to give it to some one, and to direct the person to go to witness's store and buy goods with it from H. B. Whitworth, the defendant. The next morning witness saw at Dr. Crow's house some goods which he recognized as goods from his store, viz., a man's suit of clothes worth \$15, a pair of boots worth \$3.50, a shirt worth \$1.50, an undershirt worth \$1, and three pairs of socks worth \$1,— the aggregate value being \$22. After witness went to his store that morning, the defendant told him that he, defendant, "struck" a man from the country the night before, and sold him fifteen dollars worth of goods, and received the money for them. On examination the witness found in the drawer three five-dollar bills, and afterwards carried the same bills to W. A. George. Each of the bills was marked. There was no money, except a few pieces of silver, in the cash drawer when witness left the store the night previous. Defendant's employment with witness was to expire on the 30th of September, 1880, and on the night of the 28th witness asked him to make out his account, showing how they stood, so that they might have a final settlement. Witness then went out of the store and returned in an hour or so, when defendant handed him an account, stating that it was a correct account of all matters between them. The account gave defendant credits by house-rent, \$240, services \$560, and cash \$67, aggregating \$867. It debited him "to amt. acct., \$696.78," and thus showed a balance in his favor of \$170.22.

Proceeding with his testimony, the witness Jordan stated that, after examining the account, he asked the defendant if he had given credits to witness for everything he was entitled to; and defendant replied that he had. Witness then asked him if he could think of nothing else; and he said he could not, and that the account was a correct statement of all matters between them up

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to that time. Then, says the witness, "I told him, while I was sorry to say it, I must say he had been robbing me. He asked me what I meant, or what I said? I repeated that he had been robbing me, and called his attention to several things for which I was entitled to credit, that he had not charged himself with on the account, and told him that if he would hand me his private memorandum book, I would show him others. He then pulled out his book from his pocket and handed it to me. I referred him to a number of items on it that he had gotten from my store to which I was entitled a credit on his account, and asked him why he had not included such items in the account just made out by him. He said that he intended to settle for them some other time. I then asked him, 'what about that seven dollars you stole from me last night?' He answered, 'the devil must have had possession of me.' He then told me he would make me a statement of everything he had taken from me, and began writing. I told him that I had no confidence in him, nor in the correctness of any statement he might make, and that he needn't make out any such statement. He then asked me if a deed to his interest in the Whitworth & Brumly building would satisfy me for what he had taken from me. I told him that he knew better than I did how much he had taken from me. The defendant then made out a deed to me for one-half interest in the building in which my store was, expressing in it a consideration of one thousand dollars, and delivered the deed to me and asked me not to prosecute him. I told him that that was a matter I had nothing to do with; that other parties knew of it, and that I could not prevent a prosecution if I wanted to, but if I was called upon by the legal authorities I would have to state the facts as they were. He then asked me what he must do. I told him that under the circumstances he had better leave the country. He then got an overcoat from me and left the store. No one

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except Whitworth and myself were in the store during the time of the conversation I have related. The conversation was one continuous conversation, and occurred about ten o'clock at night. W. A. George and Mr. Barkley were outside the store, near the door, when the conversation occurred." After defendant left the store, witness got W. A. George and Will Dodge to accompany him to defendant's house, to witness the deed. On reaching the place the witness called the defendant, who answered from the back yard, where he was holding his horse by the bridle. He acknowledged to signing the deed, and witness saw him no more until the succeeding Sunday, when he sent for witness to come to his house, where an interview ensued in which defendant told witness that he, the witness, had been violating the revenue laws by selling tobacco without license, and he, the defendant, could give witness trouble about it by informing on him, but would not do so if witness would not prosecute him; to which the witness replied by telling defendant to go ahead and prosecute, for that he, witness, could make him no promise not to prosecute him. Defendant never had witness's consent to appropriate to his own use the seven dollars described in the indictment.

On his cross-examination, the witness stated that a blotter, ledger and cash account were the only books kept by Jordan & Co. Generally the defendant made up the cash account at the close of each day's business, but sometimes witness made it up, and did so on the night of September 28th. The money received by defendant the night before should have gone on the cash account of the 28th. Witness kept a close watch on the cash taken in on the 28th, and was satisfied that the seven dollars retained by the defendant was not returned to the drawer that day. Witness had examined the books sufficiently to know that the seven dollars were never charged on them to defendant, nor included in the account rendered

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by him to witness. Witness thought there were several incorrect entries on the books in favor of defendant, but could not tell how many, nor say how much of the account was incorrect. The total amount of all incorrect items known to witness was less than one hundred dollars. Defendant claimed to have loaned money to the firm at different times, aggregating between sixty and seventy dollars, with which the witness supposed defendant credited himself as he should have done. Sometimes defendant paid freight for the firm, and sometimes put in amounts to make up cash demands against the firm. Defendant had the right to take what money of the firm he wanted to, provided he accounted for it on the books, and on that condition was authorized to take and use the money paid in by Darnell. During the conversation between defendant and witness in the store, they were twelve or fifteen feet from the front door, and W. A. George and P. K. Barkley were just outside the door. Witness did not have them there for the purpose of intimidating the defendant, and, though he heard them talking himself, could not say whether the defendant did. Witness let the defendant have the overcoat on credit, and offered him a suit of clothes on credit, after he left the firm's employment, and subsequently told defendant's brother that he, witness, would supply anything needed for defendant's farm or family. Witness felt safe in so doing, because defendant's brother had in his possession enough cotton belonging to the defendant to secure the witness, and defendant had directed his brother to deliver the cotton to witness. Defendant did not object to handing his private account book to witness, when the latter asked for it. The next morning, however, the witness discovered another private account book of the defendant's; it was found among some goods close to where witness and defendant were standing when the latter's account book was called for by the former, who had

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previously seen and examined it. Defendant said he executed the deed to witness in payment of what he had "damaged" witness, and the latter regarded the deed as a settlement of all accounts between them. It was not executed in consideration that witness would not prosecute the defendant. Neither before nor after its execution did witness tell defendant he would not prosecute him.

With the testimony of this witness, Jordan, the State closed its proof. The opinion indicates portions of it to which exceptions were reserved by the defense.

The only witness introduced by the defense was P. R. Barkley, who stated that it was in compliance with a request of G. W. Jordan that he was outside the latter's store on the night of September 28th.

Counsel for appellant filed and forcibly urged a motion for a rehearing, but it was overruled.

Frank & Devine, and *Kennedy*, for the appellant. The indictment does not charge the facts constituting embezzlement, nor does it inform the defendant of the charge he is to answer; and a conviction for embezzlement under an indictment which charges only theft, and which does not charge that the defendant was an agent, clerk or employee, nor that the defendant received the money alleged to have been stolen by virtue of a fiduciary relation, is not by due course of law and is unconstitutional. The State proved, over defendant's objection, that defendant was the clerk of T. R. Jordan & Co., and that G. W. Jordan had sole control of the business at Stephenville, Erath county, Texas, and that the money alleged to have been stolen was received in the course of such employment.

Embezzlement and theft are separate and distinct offenses, essentially variant. Penal Code, arts. 724, 786; *Simco v. State*, 8 Texas Ct. App. 498; *State v. Johnson*,

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28 Texas, 775. So that an indictment charging *only* theft can not charge embezzlement. The indictment must charge the facts constituting the offense in plain and intelligible language, and the offense must be included in the words of the indictment. The indictment must allege everything that it is necessary to prove. Code Crim. Proc. art. 419, part 7 and 421; *Alexander v. State*, 28 Texas, 486; *White v. State*, 3 Texas Ct. App. 606; *Horan v. State*, 7 Texas Ct. App. 188; *Bush v. Republic*, 1 Texas, 460; *State v. Schwartz*, 25 Texas, 767; *Hewitt v. State*, 25 Texas, 725; *Henderson v. State*, 1 Texas Ct. App. 438; *Longworth v. State*, 41 Texas, 162; Bishop's Crim. Law, vol. 1, § 807 *et seq.*; vol. 2, 332; Bishop's Crim. Law, vol. 1, §§ 325 and 418; vol. 2, § 315 *et seq.*; Wharton's Crim. Law, § 1969. It is necessary to prove the fiduciary relation and that the money came to defendant's hands in the course of his employment to sustain a conviction for embezzlement. Penal Code, art. 736; *Webb v. State*, 8 Texas Ct. App. 311; *Simco v. State*, Id. 408; *Gaddy v. State*, Id. 128 and authorities cited; *Griffin v. State*, 4 Texas Ct. App. 406. Code Crim. Proc. art. 714, part 6, does not change the established rules of criminal pleading which require an allegation of every fact necessary to constitute an offense; if so it is unconstitutional. State Constitution, art. 1, secs. 10, 19, 29; Webster's, Worcester's and Bouvier's Law Dictionaries, defining "*indictment*;" Code Crim. Proc. arts. 419, 420-7, 21; *Hewitt v. State*, 25 Texas, 726; Bishop's Crim. Proc. §§ 95, 109, 110, 111. When the Constitution was adopted, the word "indictment" had a clear and well defined meaning which the Legislature cannot vary.

The Legislature evidently never intended to provide that a citizen should be tried upon an indictment for one offense, and be convicted of another and different one, essentially variant, and with which the indictment did not charge him. If so the Legislature has passed beyond

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the limitations imposed by the Constitution. We submit that such a conviction is contrary to a natural sense of justice, is unconstitutional, and would amount to the greatest tyranny. A citizen has the right to be informed of the charge against him; a right guaranteed by the Constitution; and in this case he is informed of one and tried and convicted on another which this court has repeatedly held to be "separate, distinct and essentially variant." The tendency to simplify criminal pleading should never go to such an extent as to deny a citizen a right guaranteed by the Bill of Rights and dictated by reason and justice. The State cannot afford to mislead her citizen by charging him with one offense, calling him to the bar to answer that charge, and then requiring him to answer another of which he has never had notice, and has been denied the right of being informed. With all deference to the court in which the defendant was tried, we submit that the trial upon this indictment and conviction for an offense not charged savors little of fairness and justice. The Legislature cannot legislate things "separate, distinct and essentially variant" into one and the same; no more can it legislate embezzlement into a grade of theft. Certainly the defendant has never been tried upon an indictment which charges *embezzlement* in plain and intelligible language, and the conviction upon an indictment which does not is not "by due course of law." Certainly the indictment is not such as is guaranteed by the Constitution.

The court erred in permitting the State to prove, over defendant's objection, that defendant was the clerk or employee of G. W. Jordan, and that he received the money alleged to have been stolen in the course of such employment, when there were no allegations in the indictment under which such evidence was admissible. This substantially involves the rules already discussed. The rule that there must be an allegation under which

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evidence is admissible is rigorously enforced in civil practice, and the reasons for enforcing it in criminal practice are not less cogent.

The sale of the goods to Darnell was not an actual sale, but a device and pretense, so that Jordan acquired no property in the money by virtue of such pretended sale. The witness George testifies that he loaned Jordan \$25, but no connection is shown between Jordan and Darnell, or that Darnell received the money for or on account of Jordan. And it is shown that the witness Darnell received the money from W. A. George but spent it at the request of Dr. M. S. Crow, and not at the request of G. W. Jordan. No connection is shown between Jordan and Crow in the matter.

The question as to whether or not Darnell received the money for Jordan was one of fact for the jury, and the court erred in excluding it from their consideration. Did the money belong to G. W. Jordan? Had Darnell kept the money, would Jordan have been responsible to George for it? Darnell did not come for the money; George gave it to him of his own accord. Darnell had no conversation with Jordan about the matter. It was shown that T. R. Jordan & Co. were indebted to defendant. The defendant had the right to repay himself any money due him, or to take any money he wanted if he accounted for it. The witness Jordan had not compared defendant's account with the books, nor examined them carefully to see if the account was correct; and the witness G. W. Jordan himself made up the cash account on that day.

The witness Jordan states that defendant had been in his employment fourteen months, and that he rented a building from him, and that defendant had loaned T. R. Jordan & Co. money. He had authority to repay himself or to use this identical money if he wanted to. We respectfully submit that the State has failed to prove a want of consent to the appropriation of the money. The prose-

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cuting witness, *on cross-examination*, expressly says that defendant had authority to repay himself with the identical money alleged to have been stolen, or to use any money he wanted, if he accounted for it. When defendant had the consent of Jordan to the appropriation, there could be no want of consent.

The court erred in charging the jury that the evidence would not support the charge of theft, and in confining their attention to the charge of embezzlement, because such a charge assumed that a fiduciary relation existed between G. W. Jordan and defendant, and that the money alleged to have been stolen came to defendant's hands by virtue of such relation, if at all. The plea of not guilty put in issue every allegation of the indictment, and it was not conceded that defendant was a clerk or employee, or that he received any money in any capacity. The question as to whether that relation did or did not exist was solely for the jury.

The verdict is contrary to the evidence, in this, that the testimony of G. W. Jordan shows that the defendant had the right to appropriate the very money alleged to have been stolen, if he charged it to himself, or accounted for it. G. W. Jordan, himself, made up the cash account, and on demand defendant made a full and complete settlement with G. W. Jordan.

The verdict is contrary to the evidence in that the witness G. W. Jordan stated that "all the items incorrect within my knowledge are less than one hundred dollars," and that defendant had placed money into the business of T. R. Jordan & Co.; so that the firm of T. R. Jordan & Co. owed defendant at least \$70, and the defendant had a right to repay himself. And there is no averment or proof that it was defendant's duty to account to G. W. Jordan at any particular time, or at any time whatever, and the court does not know judicially that it was defendant's duty to account to G. W. Jordan. 2 Texas, 776.

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The verdict is contrary to law and the evidence, because the offense, if any, was theft and not embezzlement. The defendant received the money alleged to have been stolen, if at all, not in his capacity as clerk. It was his duty to sell goods, keep the books and collect accounts, etc., for T. R. Jordan & Co., and this was the extent of his employment. There was no sale by defendant to Darnell, and Jordan lost no property in the goods delivered to Darnell. The defendant's employment was to sell goods, collect accounts and to keep books. In this case no goods were sold, so that defendant did not receive the money in any manner within the scope of his employment. As Jordan acquired no property in the money by the pretended sale of goods, and as the goods were still in Jordan's possession, the defendant was in fact responsible only to Darnell for the money. Jordan was not pursuing the occupation of keeping money on deposit, and he acquired no property in the money by the fact that Darnell left it as a depositor with defendant, who in receiving it was acting without the scope of his authority and employment. He certainly could not as Jordan's clerk receive *payment* for Jordan's goods which were not sold (it is conceded that the sale was a pretense to entrap the defendant), for his employment in respect of the matter extended only "to selling goods and receiving pay;" so that the money never reached his hands in the course of his employment with Jordan. As he had sold no goods for Jordan, he received no pay for Jordan.

Counsel respectfully submit that a conviction for embezzlement upon an indictment which, according to the decisions of this court, charges an offense "*separate, distinct and essentially variant*," would be a dangerous precedent, and entirely at variance with the spirit of our laws, which promise a trial upon such an indictment as is intended by the Constitution, and which informs the defendant of the offense he is to answer at the bar of public justice.

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H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was indicted for the theft of money amounting in the aggregate to seven dollars, and was on the trial convicted of embezzlement. The controlling question presented for our consideration on this appeal is, whether an indictment which charges theft, in the ordinary language for charging that offense, and nothing more, will support a conviction for the crime of embezzlement, under the laws and the Constitution of this State. In our opinion this question must be answered in the affirmative.

The statute law of this State enumerates certain offenses which include offenses of a less degree of culpability than the main offense charged. Thus it is provided that the offense of murder "includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder." Also there are provisions defining what minor degrees are included within the charge of assault; and so of various other offenses, as maiming, arson, burglary, theft, perjury, bigamy, adultery, riot, kidnapping, etc. The provision with regard to theft and applicable to the case under consideration is in the following language: "Theft, which includes swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code." Here we have a positive legislative declaration that the offense of theft includes that of embezzlement as a minor grade, or inferior degree of culpability, than that of theft. Code Crim. Proc. art. 714, subdivision six.

Again: the law provides that when, as in the present case, "a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (*naming it*), but guilty of any degree inferior to that charged in the indictment or information." Code Crim. Proc. art. 713. So far as our

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information extends it has been the practice of the courts to give effect to this latter article.

For example: Under an indictment which charges murder, a conviction for manslaughter, which is a lesser degree of culpable homicide, has invariably been upheld by both the Supreme Court and this court (the trial being regular in other respects), evidently upon the idea that manslaughter is included within the charge of murder, the only offense set out in the indictment. The same may be said as to other offenses which by the law are included within the major offense charged in the indictment, though minor in degree.

With reference to the present case it may be urged against the conviction that there is no relationship existing between the two offenses of theft and embezzlement, so that the latter can with propriety be said to be a minor grade or degree of the former. Such a position is, we are of opinion, untenable. In fact it is no longer an open question in this court that the two offenses are kindred offenses; and they have been so considered in several instances, notably in the opinion prepared by Judge Clark on the rehearing of the case of *Leonard v. State*, 7 Texas Ct. App. 443; and in *Simco v. State*, 8 Texas Ct. App. 406.

It will be noticed that article 714 of the Revised Code of Criminal Procedure contains the provision that theft includes swindling and embezzlement, and this revised article was in force when the present case was tried. As was said in *Simco's* case, "the offense of embezzlement, while nearly akin to larceny, and generally regarded as of that family, is nevertheless a distinct offense and essentially variant from the latter. Theft is the fraudulent taking of personal property under certain designated circumstances, and necessarily involves the idea of an unlawful acquisition. Embezzlement is the fraudulent conversion of similar property after its possession has been lawfully acquired. This variance (the opinion pro-

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ceeds) in the character of the two offenses led the Legislature, in the adoption of the Revised Code of Criminal Procedure, to provide expressly that in a prosecution for theft a conviction might be had for embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code (citing Code Crim. Proc. art. 714, clause 6). The conviction in that case was not sustained, for the reason and only for the reason that the prosecution was under the former Code, and because the revised provision could not be held to relate back to and cover a case determined before the change took effect. In other words the provision that under an indictment for theft the offense of embezzlement was included could not, under *Calloway v. State*, 7 Texas Ct. App. 583, be made to act retrospectively. In our opinion Simco's case is in point, and must be held decisive of the present case.

It is, however, contended in behalf of the appellant that the law cited above, to the effect that theft includes embezzlement, is in violation of the spirit and letter of the Constitution. The argument advanced is (to state it briefly) that, whereas the Constitution (Bill of Rights, art. 1, sec. 10) provides "That in all criminal prosecutions the accused . . . shall have the right to demand the nature and cause of the accusation against him and to have a copy thereof," therefore an indictment which charges theft is not sufficient to inform the accused that he is charged with an offense which will support a conviction for embezzlement; that in this respect clause 6, art. 714, Code Crim. Proc., is unconstitutional. In so far as the question is involved in the present case, it will be sufficient to say that it is not within the power of the courts to decide that an act of the Legislature, a sworn body, and a coördinate department of the government, is void merely by reason of the policy or expediency of the enactment. The law-making branch of the government decides for itself as to the propriety or expediency of its enactments.

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The courts can only declare a law unconstitutional when the Legislature shall have transcended the powers conferred upon it by the Constitution, which controls alike both the legislative and the judicial departments. It is a general rule that felony cases must be prosecuted by indictment, the Constitution having provided "that no person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger." Sec. 10, art. 1. Hence the Legislature, under this provision, is deprived of the constitutional authority to dispense with an indictment of a grand jury, except in the several cases stated in the exceptions mentioned in the paragraph last quoted. But in the present case the defendant could have been prosecuted by information, it being but a petty theft, the property alleged to have been stolen amounting to only seven dollars in the aggregate. This, however, is of no importance to the question under consideration.

The indictment in this case informed the defendant that he was called on to answer a charge of theft of money alleged to belong to one Jordan. The indictment was sufficient to apprise the defendant of the nature and cause of the action against him, and the statute informed him that the jury might acquit him of the major offense charged therein and at the same time convict of the minor grade of the offense, which the Legislature has said is included within the greater; so that we are wholly unable to see that any provision of the Constitution has been impinged or infringed by the legislative enactment. The question is one of proof rather than one of pleading, somewhat analogous to the rule in indictments for assault with intent to murder. Now, if one be indicted for the

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theft of property of a certain description, the property of an individual named in the indictment, and on the trial the proof should not be sufficient to warrant a conviction for the major offense charged in the indictment, can he be heard to complain at being convicted of an inferior degree of the offense charged against him? Or can he be heard to complain that the jury has convicted of a misdemeanor and not of felonious theft? Our conclusions are that that portion of the Code found in clause 6 of art. 714 of the Code of Criminal Procedure which authorizes a conviction for embezzlement under an indictment for theft must, under the authorities, be maintained by the judiciary as not in violation of that provision of the Constitution which declares that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him.

It is further argued by the appellant's counsel, and also assigned as error, that the court erred in permitting the State to prove, over objection by the accused, that the defendant was a clerk or employee of Jordan, and that he received the money alleged to have been stolen in the course of such employment, when there was no allegation under which such evidence was admissible. Whether there was error or not in this proceeding is dependent upon the main question already considered. If a conviction for embezzlement is supported by an indictment for theft, it must be so supported by such proof as would constitute the offense for which the conviction was had. Let it be supposed that under the indictment herein, the State had proved the taking and the conversion of the money by the defendant, but in the further progress of the trial it had appeared that the defendant, at the time of the taking and conversion, was a clerk and in the employment of the alleged owner; in such a case the prosecution must fail so far as theft is concerned, and unless a conviction for embezzlement could be had under the in-

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dictment, he must be acquitted on the ground that it had appeared that a trust or fiduciary relation between the accused and the owner had been shown. This testimony was properly admitted under the law in order to show that, if the major offense had not been committed, the minor had. Hence there was no error in admitting evidence of such facts as would constitute the minor offense.

Nor did the court err in withdrawing the issue of theft from the jury, and submitting to their consideration the single question of embezzlement. It was the duty of the court to charge the jury the law of the case as made by the facts testified to by the witnesses. The proof showing that the relationship between the owner of the money and the defendant was that of employer and clerk, whilst this testimony was not sufficient to warrant a conviction for that degree of fraudulently acquiring the property, known as theft, it at the same time established one of the relations between them which bring the taking and appropriation within the letter and spirit of the law which defines embezzlement, as that offense is defined by the Penal Code, art. 786.

With reference to the present case the indictment apprised the defendant as to the time and place he was accused of fraudulently taking and appropriating to his own use the property — money — of his employer, and whether at that time he was a clerk of the alleged owner or not was certainly a fact within his own knowledge; and hence the course of proceeding could not have been a surprise to him.

In our opinion the court, by the general charge and in the first special instruction given at the request of the defendant's counsel, gave to the jury full and complete as well as accurate instructions as to the law of the case as developed by the evidence adduced on the trial, and did not err in refusing to give the special charges Nos. 2 and 3, requested by the defendant's counsel. It is apparent

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from the evidence and the charge of the court that there was a clear abandonment on the trial below of a prosecution for theft, and that the whole case turned upon the question of embezzlement. The main controversy, then, was as to whether under the indictment for theft a conviction could legally be found of embezzlement under the law. This was the main, the controlling question on the trial; the other questions are but mere incidents to this controlling question. The court below in its rulings took what we believe to be a correct view of the law of the case, and based its ruling upon the evidence; and in charging the jury as to the law seems to have kept in view the one controlling idea that under an indictment for theft a conviction could be had for embezzlement, if the proof warranted said verdict.

Whilst we have not attempted to consider *seriatim* the various questions presented in the interesting and able briefs presented in behalf of the appellant, yet we have carefully examined all the matters arising upon the record. Upon the whole our conclusions are that the indictment is sufficient under the law as cited to support the verdict of the jury and the judgment of the court; that the rulings of the court upon the evidence were correct, and that the jury were correctly instructed as to the law of the case as made by the evidence.

Finding no error in the proceedings, the judgment is affirmed.

Affirmed.

HURT, J., dissenting.

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W. J. JORDAN v. THE STATE.

1. MURDER — SELF-DEFENSE. — CHARGE OF THE COURT which, upon the question of self-defense, abridges the right of a defendant to act upon reasonable appearance of immediate danger to life or of serious bodily harm; or that instructs the jury in effect that they must find affirmatively that the danger was actual and real, or that the defendant must show affirmatively that he could not reasonably know that the danger threatened was not in fact real, is error.
2. SAME. — It is not necessary that the danger be actual and real, provided the party acted on a reasonable appearance and belief of danger. See the opinion *in extenso*, for the question and authorities discussed, and for a charge on the subject held fatally defective.

APPEAL from the District Court of Fayette. Tried below before the Hon. L. W. MOORE.

The indictment charged the murder of Joseph Hassel-meyer, on the 14th day of July, 1881. The conviction was for murder in the second degree, with the punishment assessed at a term of fifteen years in the penitentiary.

In addition to the testimony of Kennon as set out in the opinion of the court, the State proved by the widow of the deceased that, about sunrise on the morning of January 14th, 1881, the deceased left his house to go into his patch to cut cane with which to feed his hogs. Shortly after he left the house, the witness heard the barking of her dogs, and, looking in the direction, she saw the deceased standing near the cane-patch, at the edge of some cotton-rows. Presently the dogs returned to the house and the witness went to her cow-pen to milk, and while there heard two reports of a gun. She looked in the direction from whence they proceeded, southwest, and saw the defendant going from that point towards his house, carrying a gun in his hands. The witness, at the time, had climbed up on her gate, and could see the defendant distinctly. She remained at the fence for a short time and then went to the house, and finding that the

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deceased had not returned she became alarmed, and presently went to the house of a neighbor, Mr. Hilmer, and requested his assistance in searching for her husband. About one hour had elapsed since the shots spoken of were fired. After searching in several directions, she and Hilmer found the dead body of her husband at the point where the shots were fired.

Hilmer, from there went to Flatonia to notify the authorities, and the witness went to the house, but presently returned to the body with the mother of the deceased and Mrs. Bruner. Mr. Burns came presently and agreed to watch with the corpse until the officers arrived, and the witness, her mother-in-law and Mrs. Bruner returned to the house. The deceased did not own a pistol, had none about his person nor about his house. He had no hip pockets in his pants, and only a pocket knife. He was in his shirt-sleeves when his body was found. The defendant and the deceased had a law-suit about hogs in the fall of 1880, and had not been friendly since.

H. Hilmer testified for the State that he lived about seventy-five yards distant from the house of the deceased. When he was turning his cows out on the morning of January 14, 1881, he heard two reports of a gun. He looked in a southwest direction, from whence it proceeded, and saw smoke rising from about the spot where, afterwards, he and Mrs. Hasselmeyer found the body of the deceased. He corroborated Mrs. Hasselmeyer as to her coming for him, their joint search for and discovery of the body. When found the body was extended face upwards, with the right hand thrown down by the side, and the left up towards the shoulder. The witness looked about the body for fire-arms but found none. The deceased had been shot through the left eye. The witness got Mrs. Hasselmeyer to go home, and he went to Flatonia for the officers, found and advised them of the killing, and then went to his own home.

C. Stoffers testified that he was one of the jury of in-

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quest. He saw the body of deceased lying in the road, back down, face upwards, with the right hand resting by his side, and the left on, and a little under the body. Weapons were looked for, but, save a common pocket-knife, closed and in a pocket, none were found. The left eye had been penetrated with, apparently, a load of shot, besides which no other wounds were found. The body lay about 500 yards from the house, and about 175 steps from the fence of the deceased, and about 200 steps from the defendant's cow-pen. There was timber and undergrowth between the body of the deceased and his field-fence, and thick timber and undergrowth between the body and defendant's cow-pen. From the house of the deceased to defendant's house the distance in a direct line is about 415 steps, the defendant's field intervening. At the time of the killing, cotton and corn were standing in the field, but, nevertheless, a person standing at or near the house of the deceased could distinctly see a person at either the defendant's house or cow-pen. The witness knew this by experiment.

Martin Sloan testified that he was one of the party who arrested the defendant. They failed to find defendant at his house, and went to Kirksey's and asked if he was there. The reply being affirmative, the party went into the house. As they went in, the defendant met them and said, "well, boys, I got into it, this morning." He was not then under arrest, nor had he been told the purpose of the party in going to the house. The witness replied, "yes, and we have come after you." The defendant then took a small six-shooting pistol from the mantel, and handed it to Lane, one of the party. Thence he was taken to the corpse and delivered to the officer, Mr. Doggett.

H. W. Yeager, for the State, testified that a person at or near deceased's house could readily see and recognize another at the defendant's house or cow-pen. He was positive of this fact, having verified it by experiment.

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C. W. Burns was the first witness for the defense. He testified that he resided, at the time of the killing, in Flatonia, about five miles from deceased's house. When he received the news of the killing, on the morning it occurred, he went direct to the corpse, where he found Mrs. Hasselmeyer, Mrs. Bruner, and the mother of the deceased, and relieved them in their watch over the body. The deceased was lying on his back, his right hand by his side, and his left under his body. A gun shot had penetrated the left eye. The witness saw neither gun nor pistol about the body. He examined for tracks, and found some leading from the body in the direction of the house of a son of the defendant. He found none leading towards defendant's house. While waiting for the jury of inquest, he went up to defendant's house for a drink of water, but said nothing about the killing. The topography of the vicinity, as described by this witness, corresponded with that given in the evidence for the State, except that he stated, in addition, that defendant's house was 75 yards farther from the body than his cow-pen was. The witness had stood in the cow-pen of the deceased and attempted to recognize persons at the defendant's cow-pen. He could see persons at but one point near, and could not possibly recognize them.

Mrs. Laney testified for the defense that she was a daughter of the defendant. About sun-rise on January 14, 1881, she was in the cow-pen milking, the defendant and her son being with her. While there they heard dogs barking and hogs squealing. The defendant remarked that Hasselmeyer's dogs were after his hogs and he would go down there. In a few moments she heard defendant say, "Are you going to kill my hogs?" She heard deceased reply "No! d—n you; I will kill you!" She then heard two shots, and saw no more of the defendant until after his arrest. She knew that it was the deceased who said "No! d—n you; I will kill you!" by his voice, and his speaking broken.

Argument for the appellant.

Jas. Jordan, a son of the defendant, testified that his father came to his house about 7 o'clock on the morning of January 14th, and had his shot-gun with him, one barrel loaded. He told witness about the killing, and gave him a note to take to Flatonina. The defendant left his gun at witness's house, and went to Kirksey's, about 300 yards distant. The defendant had no pistol. Defendant was between sixty and sixty-five years old.

One witness for the defense testified that the deceased was left-handed, and another that the defendant's reputation was that of a peaceable, quiet, law-abiding, inoffensive old man.

Moore & Lane and *Phelps & Haidusek*, for the appellant. The court below erred in its charge to the jury upon the rules essential to be observed in the exercise of the right of self-defense by the defendant.

In this cause it was the duty of the court in charging the law of self-defense to give the law in full, to wit:

First. The right of defendant to slay Hasselmeyer if done to prevent deceased from murdering or maiming him.

Second. The right of defendant to slay Hasselmeyer if he, deceased, was making any other unlawful and violent attack on defendant after using all other means to prevent the injury, but that defendant was not bound to retreat to avoid the necessity of killing the deceased.

Third. That defendant had a right to slay deceased if he was attacking him in such a manner as to produce in the defendant a reasonable expectation or fear of death, and that it made no difference whether the danger was real or imaginary if defendant believed it to be real.

In this charge the court makes the jury the judges, from the facts in evidence before them, "*whether or not the defendant was in danger, or that there was a real appearance of danger.*" In the case of *Blake v. State*, 3

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Texas Ct. App. 583, the lamented Judge Ector said, in laying down this branch of law: "It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief." In this cause the court below goes farther and virtually charges the jury that defendant should have stopped and examined whether or not deceased had a pistol when he threw his hand behind him, and that he should not have fired until he saw the weapon in the hand of deceased. Penal Code, arts. 570, 572, 573 and 574; *Lister v. State*, 3 Texas Ct. App. 17; *Blake v. State*, 3 Texas Ct. App. 583; *Babb v. State*, 8 Texas Ct. App. 177, and authorities there cited; *Ainsworth v. State*, 8 Texas Ct. App. 537; *Hill v. State*, 10 Texas Ct. App. 625.

The court below erred in that portion of its charge to the jury in which it informs the jury of the weight to be given to the confessions or admissions of a defendant when the same are introduced in evidence by the State.

It was the duty of the court to instruct the jury that when the admissions or confessions of a party are introduced in evidence by the State, then the whole of the admissions or confessions are to be taken together, and the State is bound by them unless they are shown to be untrue by the evidence.

Upon this branch of the case the court charged the jury as follows: "The State having introduced the confessions or admissions of the defendant, *if the same are reasonable and consistent*, the State is bound by them, unless by other circumstances and facts the same is disproved, and such admissions or confessions the jury should consider in connection with all the facts and circumstances of the case, and you should determine from all the evidence whether *in fact* the deceased *did in fact* make such a demonstration as to produce a reasonable belief of danger as before defined." This charge is not in accord with the

Argument for the appellant.

law of our State or the decisions of our courts; and the fifth charge asked by defendant and refused by the court contained the law of the case as applicable to this branch of the evidence. *Pharr v. State*, 7 Texas Ct. App. 478.

The court below erred in refusing to give in charge to the jury the charges asked by defendant.

The charges, one, two and three asked by defendant contained the law of this State upon the subject of self-defense, and it was error in the court to refuse to give them.

Defendant asked the court to give in charge to the jury the following charges, to wit: "First: Defendant would be justified in the killing if it is shown to have been done to prevent Hasselmeyer from murdering or maiming him; but in that case it must reasonably appear by the acts or by the words coupled with the acts of Hasselmeyer that he intended to murder or maim the defendant, and the killing must have taken place while Hasselmeyer was in the act of committing such offense, or after some act done by him showing evidently an intent to commit such offense. If, therefore, you believe from the evidence that at the time of the homicide deceased told the defendant that he would kill him, and made gestures as though to draw a weapon, and that defendant did believe that deceased was about to murder or maim him, and that while deceased was in the act of making such hostile demonstration, defendant shot and killed him, then defendant was justifiable in slaying the deceased, and you will acquit.

"Second: If you believe from the evidence that deceased made any other unlawful and violent attack upon defendant besides one with intent to murder or maim defendant, then defendant would be justified in defending himself from such attack and in taking the life of deceased. But to justify himself in killing Hasselmeyer, to defend himself from an attack from Hasselmeyer, not

Argument for the appellant.

amounting to an assault to murder or maim, defendant must have resorted to all other means for the prevention of the injury, and the killing must have taken place while Hasselmeyer was in the very act of making such unlawful and violent attack; but in this event defendant would not be bound to retreat to avoid the necessity of killing the deceased.

"Third: If you believe from the evidence that defendant killed Hasselmeyer, but also believe that Hasselmeyer was attacking defendant at the time, and that such attack produced in defendant a reasonable expectation or fear of death or some serious bodily injury, then defendant would be justified in the killing, and it would make no difference whether such danger was real or imaginary, if it had the appearance to him of being real, and if he acted on such belief of apparent danger." *Blake v. State*, 3 Texas Ct. App. 588; *Marnoch v. State*, 7 Texas Ct. App. 274; *Babb v. State*, 8 Texas Ct. App. 176.

The fifth charge asked by the defendant contained the law of this State as announced by our courts in regard to the weight and effect of confessions or admissions of defendant when introduced by the State, and it was error in the court to refuse it.

Defendant asked the court to charge the jury as follows:

"Fifth: When the admissions or confession of the defendant are introduced by the State, then the whole of the admissions or confessions are to be taken together, and the State is bound by them, unless they are shown to be untrue by the evidence. Such admissions or confessions are to be taken into consideration by the jury as evidence in connection with all the other facts and circumstances of the case." The above charge is one which Judge Winkler, in the case of *Pharr v. State*, says "is substantially correct," and was refused; while the court gave one which informed the jury *that the State was not*

Argument for the State.

bound by them "unless the same is reasonable and consistent." Pharr v. State, 7 Texas Ct. App. 478.

H. Chilton, Assistant Attorney General, for the State.

T. H. Franklin, District Attorney, also for the State. Where a defendant seeks to justify a homicide upon the reasonable appearance of danger, the reasonableness of such appearances is a fact that the jury must find before they can acquit. Any other construction of the law would permit any defendant in a murder case, where the State has to put in evidence his statement of the manner of the homicide, to simply assert that he believed himself to be in danger at the time of the killing, and for that reason killed the deceased, and the State could not then inquire into the circumstances producing such belief. Nor could the reasonableness of such belief be passed upon by the jury.

In *Horbach v. State*, Judge Roberts says: "It is true the law requires a party killing to act under the responsibility to himself of acting soon enough to save himself from the loss of life or from serious bodily injury, such as mayhem on the one hand, and on the other the risk of exercising firmness and discretion to wait long enough until some act is done by the deceased, at the time, by which *the jury trying the case will be satisfied, considering all the surrounding circumstances, and the parties concerned, that the defendant had reasonable grounds to believe, and did then believe, that he was then in imminent and impending danger of being murdered or maimed by his assailant.*" *Horbach v. State*, 43 Texas, 257.

The jury must be satisfied, 1st, of the act of deceased; 2d, of the circumstances surrounding and the parties concerned; 3d, in view of the act, the circumstances and the parties, of the existence of reasonable grounds for defendant to believe himself to be in imminent danger; 4th,

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of the actual existence of such belief, at the time, in the mind of defendant. In the language of the charge, "the jury will determine whether in fact that the defendant was in danger, or that there was a reasonable appearance of danger."

In *Blake v. State*, 3 Texas Ct. App. 589, Judge Ector uses this language: "Self-defense is a defensive and not an offensive act, and must not exceed the bounds of mere defense and prevention. To justify a homicide there must be at least an apparent necessity to ward off by force some unlawful and violent attack. *It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say that he had reasonable grounds for his belief.*"

Second. Under the facts of this case this charge is peculiarly appropriate. The State introduced as evidence the bare statement of the defendant that he had killed deceased, and the defendant then drew out the remainder of said statements to show justification. The State then attacked the truth of some of said statements by evidence. It then became a question for the jury to decide, whether all of said statements were true or not,—whether it was a fact that defendant was in danger at the time of the killing, or that there was a reasonable appearance of danger, and whether such portion of said statements as showed a threatening gesture on the part of deceased was true or was simply an excuse for the killing fabricated after the homicide.

As to the second objection to the charge upon the subject of self-defense I submit that the same is not well taken, for the following reasons:

1st. Because, whilst it is true that, "where at the time of the killing, some act has been done by the deceased showing evidently an intent to murder or maim, then and there, in that event, the party thus attacked need not resort to other means before killing his assailant, be-

Argument for the State.

cause it is presumed in such a case that the party's safety depends upon his prompt action in killing his adversary" (Horbach's case); yet, when ordinary care on the part of defendant would *show him that the act done did not really evidence an immediate intent to murder or maim*, then he should be held to such care. Where a man takes that which God has given — life — and seeks to justify himself on the ground that he acted from necessity, certainly ordinary care should be shown upon his part to ascertain the reality of such necessity.

A brief reference to the facts of this case will show the absolute necessity of the existence of some such rule if any protection is to be given to human life in this State.

A man need not resort to other means to prevent the person whom he kills from murdering or maiming, before he kills such person, when he has reasonable grounds to believe himself in immediate danger of the loss of life or limb; but ordinary care should be exercised by him to ascertain the reality of the threatened danger in the meaning of the acts of deceased, the *reasonableness of his belief that he is about to be assaulted*.

What better evidence of malice,—of a reckless disregard of human life,—of a mind fatally bent upon mischief,—is there than the killing of one human being by another, when a little care exercised by the slayer would have shown him that the one whom he killed was in no condition to do him any injury?

Second. If a person is not justified in killing another upon appearance of danger, unless the facts and circumstances were such that the jury can say that he had reasonable grounds for his belief ("that he was in danger"—*Blake v. State, supra*), must not ordinary care be taken by such person to ascertain the reality of such danger, before the jury can be called upon to pass intelligently on the *reasonableness of defendant's belief*?

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Third. By reference to the facts of this case it will appear that no injury could possibly have resulted to defendant from said charge even if the same is erroneous.

WHITE, P. J. There was no eye-witness to the immediate fact of the killing. Appellant's admissions or confessions with regard to the attendant circumstances were introduced in evidence (without objection) *by the State* through her witness Robert Kennon, who testified,—“On the morning of the 14th day of July, A. D. 1881, I drove a cow to the pen of Mr. Jordan, the defendant, where I had some other cattle, and, after putting the cow in the pen, I, in company with Wm. Heard, rode off in the direction of where a son of the defendant lives. When about a mile or a mile and a half from defendant's house, near the house of Kirksey, defendant, who was in the field, hallooed to us and came out to where we were. He, defendant, as soon as he got to us, asked me if Mr. O'Daniel was in Flatonia. I told him I did not think he was; that I believed he was off at Major Penn's camp-meeting. Defendant then asked me who was acting in his place as constable. I told him I did not know, but thought Mr. Doggett or Mr. Evans was. I then asked him what was the matter. He told me he wanted to give himself up; that he had killed Mr. Hasselmeyer, and that he had to do it. Defendant said ~~that~~, about sunrise, he was at his cow-pen, and heard Hasselmeyer's dogs after his, ~~defendant's~~ hogs; that he heard his hogs squealing; ~~that he went~~ to his house and got his gun, intending to kill the dogs; that he got in sight of the dogs and had his gun cocked on them, when he first saw Hasselmeyer coming; that he asked Hasselmeyer if he was going to kill his hogs? That Hasselmeyer replied, ‘No, d—n you; I will kill you,’ and as he said this he threw his left hand behind him. That when he saw Hasselmeyer make this motion he shot him.”

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Other evidence showed that deceased was "a left-handed man;" that when the body was found the dead man was lying upon his back, his face upwards, his right arm lying by his side, and his left partly under the body. It was in proof, however, that deceased, when he left home and when found dead, was in his shirt-sleeves,—had on no coat,—had no hip or pistol pocket in his pants,—had no weapon on, nor was any found about his person, save an ordinary pocket knife, which was found shut up in one of the pockets of his pants.

The charge of the court is not complained of in so far as it presented the law of murder. Upon the law of self-defense the charge of the court was: "If you believe from the evidence that the defendant did kill Joseph Hasselmeyer, and if you further believe from the evidence that, at the time of the killing, the deceased was making such an attack upon the defendant as to produce a reasonable expectation or fear of death or some serious bodily harm, or if you believe from the evidence that, at the time of the killing, the deceased was threatening to take the life of the defendant, and did then, by some act done, manifest his intention to execute the same, you will acquit. Nor is it required that the danger be actual and real if such danger, under the circumstances surrounding the parties, reasonably appeared so. The jury will determine whether in fact the defendant was in danger, or that there was a reasonable appearance of danger; and if you believe at the time of killing (if you believe defendant did kill Hasselmeyer) that said Hasselmeyer was not in a condition to seriously injure the defendant, but if you believe he did know he was in no such danger, or could have known it by reasonable care exercised, then such killing would not be justifiable."

Objection has been made, and, as we think, not without reason, to the latter portion of this charge. It was certainly calculated to mislead the jury, in telling them that they would "determine whether in fact the defend-

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ant was in danger." That was not the question to be determined by them. The evidence, as they had it before them, showed really that deceased was wholly unarmed,—that he did not even have a hip-pocket in which to carry a weapon,—and with knowledge of such facts in evidence before them we imagine it would not be difficult for them to arrive at the conclusion that defendant was in fact in no danger. But did defendant have the same knowledge of these facts at the time of the killing? The law does not hold him to the actual existence of danger, but the criterion of action with him is that "it must reasonably appear by the acts, or by words coupled with the acts, of the person killed that it was the purpose and intent of such person to commit murder or inflict serious bodily harm upon him." Penal Code, art. 570. And again: "The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death or serious bodily" harm. Penal Code, art. 574. The question is not one of actual danger, but of reasonable apprehension of danger. And it is one which in all fairness can only be determined by the facts as they appeared to the party killing at the very time of the homicide; and not by the facts as they may be shown really to have existed, after a calm, quiet and thorough investigation by a jury. As was said in Richardson's case, "a defendant is always justifiable in acting for his defense, or the defense of his family or property, according to the circumstances as they reasonably appear to him, and it is but just and right that his action should be judged of in the light of the circumstances as they appeared to him at the time. Such is our understanding of the law, and such the rule of decision in this State. It is not necessary that there should have been actual danger, provided the party acted on a reasonable apprehension of danger." *Richardson v. State*, 7 Texas Ct. App. 486, and authorities cited.

Nor is the other proposition submitted by the court,

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viz., that the jury will determine whether "there was a reasonable appearance of danger," any more nearly correct in law than the one just noticed; because, in determining that question, the jury would in the very nature of things, look to all the facts in evidence before them, many of which might not, could not, and doubtless were not known to the defendant at the time of the killing. The question was not how the facts and circumstances appeared to the jury after hearing all the evidence, but, on the other hand, were the facts and circumstances, as they appeared *at the time* to the defendant, such as that they can say he had reasonable grounds for his belief that he was in danger of death or serious bodily harm. *Blake v. State*, 3 Texas Ct. App. 581.

Again: in the paragraph quoted from the charge, the jury were further told, "If you believe he (defendant) did know he was in no such danger, *or could have known it by reasonable care exercised*, then such killing would not be justifiable." A party who has reasonable expectation or fear of death or serious bodily harm, imminent and pressing under the circumstances as they appear to him, is not required to wait until he has by the exercise of reason carefully examined all the facts necessary to be known as to the truth and correctness of his apprehensions. To require this would be to render entirely nugatory and worthless that kind and humane provision of the law which allows him to act, and act promptly, even to the taking of his assailant's life, when it reasonably appears by the acts, or by the words coupled with the acts, of the person killed that it was the purpose and intent of such person to take his life or to do him some serious bodily harm. When a man has a reasonable expectation or fear of death or of some serious bodily harm from an unlawful attack made upon him, he may kill, and kill upon the very spur of the moment, and the law will justify the homicide without requiring him to show that by

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the exercise of additional care the killing could not have been avoided with safety to himself. Penal Code, art. 574; *Ross v. State*, 10 Texas Ct. App. 455; *Kendall v. State*, 8 Texas Ct. App. 569; *Ainsworth v. State*, Id. 532. It is only in cases where the unlawful attack upon person or property is not made with a purpose of taking his life or doing him serious bodily harm, that the party assailed is required not only to exercise care but to resort to all other means save retreating, before he can justify the taking of human life. Penal Code, art. 572; *Kendall v. State*, 8 Texas Ct. App. 569; *Hill v. State*, 10 Texas Ct. App. 618.

The first, second, and third special instructions requested for defendant embodied a correct enunciation of the principles of the law of justifiable homicide in self-defense, as applicable to the evidence in the case, and should have been given instead of the charge above discussed. It is unnecessary further to discuss the charge of the court with reference to the confessions or admissions of defendant, than to say that the fifth special instruction on this branch of the case requested for defendant was a correct expression of the law as held by this court in *Pharr v. State*, 7 Texas Ct. App. 472, whilst the charge as given was not wholly free from objection.

For error in the charge of the court as above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

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TOM BROWN v. THE STATE.

1. **AFFIDAVIT.**—The Code of Procedure, article 431, enacts that no information shall be presented until oath in writing has been made by some credible person charging the defendant with an offense. No form for the affidavit is prescribed, and substantial compliance with the provisions of the Code is sufficient.
2. **SAME.**—To an affidavit for an information it is objected that the commission of the inculpatory act is not alleged positively, but only to “the best of the knowledge and belief” of the affiant. *Held*, that the allegation is sufficient, and the objection not tenable.
3. **INFORMATIONS.**—No offense is charged by an information which, without itself alleging the inculpatory act, refers to the “affidavit which is herewith filed and shows” the commission of the act by the accused.
4. **SAME.**—AMENDMENT of formal defects in an information is allowable, but not of substantial defects.
5. **QUERE.**—Whether the substance of an information can be amended by consent of the parties,—the Code of Procedure, article 550, providing that “No matter of substance can be amended.”
6. **PRACTICE IN THIS COURT.**—By the record alone is a cause determinable on appeal. It is not competent for the county judge and the prosecuting attorney to authenticate matters *dehors* the record.

APPEAL from the County Court of Brazoria. Tried below before the Hon. E. N. WILSON, County Judge.

The conviction was for adultery, and a fine of \$200 the punishment imposed on the appellant. The matters relevant to the rulings are disclosed in the opinion.

E. J. Wilson and *T. G. & H. Masterson*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. It is a provision of the Code of Criminal Procedure that “An information shall not be presented by the district or county attorney until oath has been made by some credible person charging the defendant with an offense. The oath shall be reduced to writing

11	451
32	504
11	451
34	87
11	451
85	572

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and filed with the information. It may be sworn to before the district or county attorney, who for that purpose shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths." Code Crim. Proc. art. 431.

"Upon complaint being made before a district or county attorney that an offense has been committed in his district or county, he shall reduce the complaint to writing, and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by said attorney. Said complaint shall state the name of the accused, if his name is known, and if his name is not known it shall describe him as fully as possible, and the offense with which he is charged shall be stated in plain and intelligible words, and it must appear that the offense was committed in the county where the complaint is filed and within a time not barred by limitation." Code Crim. Proc. art. 35. "If the offense be a misdemeanor, the attorney shall forthwith prepare an information and file the same, together with the complaint, in the court having jurisdiction of the offense." Code Crim. Proc. art. 36.

No precise form is prescribed for a complaint, and a substantial compliance with the terms of the provisions quoted will be sufficient. If we turn to the statute with regard to complaints, when made before magistrates, we find that the law declares them sufficient, without regard to form, if they have the substantial requisites therein named; one of which is that "*it must state that the accused has committed some offense against the laws of the State, naming the offense, or that the affiant has good reason to believe and does believe that the accused has committed such offense.*" Code Crim. Proc. art. 236.

We are of opinion that the complaint in the case before us is sufficient under these provisions, the objection urged being solely that affiant deposed "to the best of his

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knowledge and belief," and not positively, to the fact stated. "A charge merely upon knowledge and belief of the complainant has been held in Maine to be sufficient, without a more positive averment." 1 Bish. Crim. Proc. (3d Ed.) sec. 230; *State v. Hobbs*, 39 Maine, 212; *State v. Dale*, 3 Wis. 795; *People v. Becker*, 20 N. Y. 354.

So much for the complaint. As to the information, it is beyond question fatally defective under the rules laid down in *Hunt v. State*, 9 Texas Ct. App. 404. The charging clause of the information in the present as in that case refers to the complaint upon which it was based, and alleges that the affidavit "shows" the matters and things charged against the accused, instead of averring the facts affirmatively and directly, and with positiveness and certainty. It appears that the prosecuting officer and county judge became aware of the defect in the information and they endeavored to supply it by an amendment. This could not be done in regard to matter of substance. Amendments of indictments or informations are allowable as to matters of form, but "no matter of substance can be amended." Code Crim. Proc. art. 550.

We find accompanying the record an independent original statement by the county judge and county attorney, to the effect that the amendment was made by consent of attorneys and permission of court, and was filed before the case was called. No such fact is disclosed by the record, and by that and that alone the case must be determined here. The county judge and county attorney cannot give authenticity to facts *dehors* the record by certifying to them. Besides this statement and contradictory of it, we find that the motion in arrest of judgment is in part based upon this insufficiency of the information; the assignment of errors makes the same objection to the validity of the judgment, and counsel for appellant is again urging it before this court as ground of reversal. If the amendment had been really agreed to and was act-

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ually made, it is questionable, in the face of the express language of the statute quoted above, as to whether such action could be upheld; but, to say the least of it, where such action is sought to be maintained the record should show beyond question that the amendment had in fact been made.

The judgment is reversed and the cause remanded.

Reversed and remanded.

11	454
29	285
29	408

W. L. GRANGER *v.* THE STATE.

1. CHARGE OF THE COURT when read to the jury must be filed, and from that time constitutes a part of the record in the cause. Its alteration or amendment without the consent of the defendant is such error as will necessitate reversal of a conviction.
2. SAME.—When additional instructions are allowed to be given at the request of the jury, they can only be given when the defendant is present in court.
3. SAME.—The court, of its own motion, altered its charge in the absence of the defendant and without his knowledge or consent; of which action he complained in his motion for new trial. *Held*, that whether or not the alteration was material, the action of the court was error.
4. SAME.—*Alibi* being the defense interposed, the court below erred in failing to charge sufficiently the law on that issue.

APPEAL from the District Court of Bandera. Tried below before the Hon. T. M. PASCHAL.

The appellant was charged by indictment with the theft of one head of neat cattle, on the 1st day of July, 1879. The possession of the animal was alleged to be in J. L. McKeen. The jury found defendant guilty, and fixed the punishment at a term of two years in the penitentiary.

The substance of the testimony of McKeen, for the State, was that he left his house to go to the post office,

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on the 3d day of July, 1879, and when near Cherry Springs, about two and a half miles from home, he heard a gun fired, and presently saw a number of Mr. Smith's cattle running from the direction of the shot. He rode in the direction of the report, and came upon the defendant, sitting on the body of a calf which had just been shot through the head. When the defendant saw the witness he ran to his horse, which was tied near by, but as he could not untie the horse readily, he fled on foot. The witness went on to the post office, and on his return stopped again at the scene of the shooting, and found only the hide, head and feet of the animal. He took the hide home with him. The animal belonged to a Mr. Smith, but, with other of Smith's cattle, was in the witness's charge. It was about two o'clock, P. M., on the 3d day of July, 1879, when the witness discovered the defendant sitting on the body of the calf.

The testimony for the defense on the question of *alibi*, which was the only defense interposed, located the defendant at the house of a Mrs. Simpson, a distance of nine miles from McKeen's, at two o'clock on the 3d day of July, 1879.

H. C. Duffy, R. H. Burney and W. W. Martin, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. When the charge which is given by the court is read to the jury, it is required to be filed and from that time constitutes part of the record in the cause. Code Crim. Proc. art. 680. It cannot be altered or amended in any manner without the consent of the defendant. To do so constitutes error requiring a reversal. *Goss v. State*, 40 Texas, 520; *Garza v. State*, 3 Texas Ct. App. 286; *Boothe v. State*, 4 Texas Ct. App. 202. Even where addi-

Syllabus.

tional instructions are allowed to be given at the request of the jury [Code Crim. Proc. art. 696], the statute declares that "the defendant shall be present in court." Code Crim. Proc. art. 698.

In the case before us the defendant was not only not present when the court of its own motion altered the charge, but he objected to the action of the court in that regard in his motion for a new trial, and insists upon the error on this appeal. It is not a question as to the materiality or immateriality of the alteration as made, but the question is, was the record altered without the knowledge, presence, and consent of defendant? If so, the action is wrong, and to overlook or permit it in immaterial, or what might be deemed unimportant matters might establish a precedent which could be availed of to excuse injustice and wrong in matters of the gravest import.

No other defense than that of an *alibi* was claimed by defendant. The charge of the court wholly fails to present the law sufficiently as to this issue, as it should have done. *Deggs v. State*, 7 Texas Ct. App. 359; *McGrew v. State*, 10 Texas Ct. App. 539. For the errors noticed, the judgment is reversed and the case remanded.

Reversed and remanded.

SALLY HILL v. THE STATE.

1. **MURDER—MALICE.**—When the proof shows an unlawful killing, and no evidence has been adduced which tends to show express malice on the one hand, or any justification, excuse or mitigation on the other, the law implies malice, and the offense is murder of the second degree.
2. **SAME.**—**CHARGE OF THE COURT** directed the jury, in the event of finding from the evidence that the defendant was guilty of murder in the second degree, to assess his punishment at confinement in the penitentiary for any length of time "not less than five,"—the word "years" being omitted. *Held*, that the context supplies the

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omitted word, "years," and that the omission could not have misled the jury.

3. **MANSLAUGHTER.**—**ADEQUATE CAUSE** is an essential element of the offense of manslaughter. In the absence of evidence tending to show the existence of adequate cause, the court did not err in refusing a charge upon manslaughter.
4. **HOMICIDAL INTENT.**—Article 612 of the Penal Code provides: "That the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed unless from the manner in which it was used such intention evidently appears."
5. **SAME.**—Article 613 of the Penal Code provides that "if any injury be afflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing will be manslaughter or murder according to the facts of the case." Articles 612 and 613 apply to cases where *intent* to kill evidently appears, or where such intent is evidenced by the cruelty of the manner in which the injury was inflicted.
6. **SAME — CHARGE OF THE COURT.**—Article 614 of the Penal Code embodies the law of a case in which there was no intention to kill; and when the homicidal act was divested of the elements of an evil and cruel disposition. Under it the person offending may be prosecuted and convicted of any grade of assault and battery. Note the state of proof held in this case to necessitate a charge to the jury embodying the law as enacted in said article 614.

APPEAL from the District Court of Marion. Tried below before the Hon. B. T. ESTES.

The indictment charged the appellant with the murder of "Mack," a colored child, by whipping, beating, choking and strangling. The offense is charged to have been committed in Marion county, Texas, on the 19th day of August, 1881. Her trial resulted in a conviction of murder in the second degree, and the punishment was fixed by the jury at a term of ten years in the penitentiary.

The opinion of this court gives a clear outline of this case and an explicit summary of the most material portions of the testimony. The evidence in detail, however, will be found to enhance the significance of the rulings.

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The defendant and the deceased, as well as most of the witnesses, were negroes.

The first witness introduced by the prosecution was Emeline Cole, who seems to have been the only observer of the violence to which the prosecution imputed the death of the child. Her testimony in chief appears fully in the opinion of this court. On her cross-examination she stated that she had never seen the defendant whip the child before the occasion on Tuesday, August 17, 1881, the incidents of which the witness had narrated in her direct testimony. Witness lived close to the defendant, but they had not visited each other. After defendant had whipped the child, the witness walked in and sat down on the gallery in front of defendant's house. The child, by order of the defendant, then went off after aunt Sally Alexander, who lived about a quarter of a mile from defendant's. When the child returned, after nearly an hour's absence, he sat down on the gallery with witness. He did not complain of being hurt, and said little or nothing. Witness left before aunt Sally Alexander came to defendant's. The child appeared sickly and weakly all the time witness knew him, and on the 17th of August, 1881, his hands, feet and body were puffed up and swollen.

Maria Gillam, for the State, testified that she lived about forty yards from defendant's, and knew the child Mack in his lifetime. . About sunset on the Tuesday before the Thursday on which Mack died, he asked witness for a drink of water, and when she gave it to him she noticed a bruise on his head. Cross-examined, the witness stated that Mack always seemed to be so sick that she pitied him. Witness heard no whipping, screaming or blows at defendant's on the day she noticed the bruise on Mack's head, nor had she ever heard any there either before or since that day.

Harriett Thompson, for the State, testified that Mack had been sickly and puny for a long time before he died.

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On the Tuesday or Wednesday before his death, witness saw him driving some ducks or geese along the road towards the defendant's house, when the defendant came up behind him, and, after saying something to him, commenced whipping him. Witness could not tell the size of the switch or stick with which the whipping was done, but saw the licks. Mack came to witness's house that day; he was looking awful bad. On her cross-examination the witness stated that she lived in the third house from defendant's. She did not examine Mack's mouth and throat on the day spoken of; but one of her daughters did, and found them sore and swollen. Witness was not on visiting terms with the defendant. They had fallen out about witness getting water from defendant's well.

Sally Kelly, for the State, testified that she and several other colored women went to the defendant's on the Thursday morning, after they heard the child was dead. They stood at defendant's gate and one of them asked defendant where the dog was. Defendant replied that the dog was under the house, and then, speaking to witness and the rest, said: "I don't know what all you negro whores are coming up here for; you have not been coming here, and you are not welcome here now." Sallie Alexander was there washing the dead child, and defendant said she was hunting a sheet to lay the child out on. Witness said, "let's get away from here," and she and her companions left. She heard the defendant say that the little son of a bitch was dead and gone out of her way either to heaven or hell, and she did not care which,—that she could now occupy her room.

Cross-examined, the witness stated that she and her companions never had visited nor had any dealings with the defendant, who thought them not nice enough to associate with her. She called them strumpets, and told them they were not welcome at her house. Witness

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stated that she was the girl who had had three fights with a certain doctor, and who reported him. She thought Mack was not a strong child, and that he was rather sickly looking; but stated that he was well about dusk the night before the day of his death, and was then at witness's house, and asked her for a nickel, saying that he had lost one given him by the defendant to buy some oil with, and wanted witness to give him another so that the defendant would not whip him. He was then well and bright, as usual; nothing was the matter with him that witness could see.

Sally Alexander, for the State, testified that she was a regular visitor of the defendant, and had seen defendant whip Mack, but not on the day Mack came after witness as stated by Emeline Cole. Witness, defendant and another woman were the only persons present when Mack died. On her cross-examination the witness stated that she had been seeing Mack at the defendant's several months, ever since the latter married her last husband. Mack was sickly all the time. A week or two before he died they gave him mullen tea, without benefit, and then they went to Mr. Robinson and got some medicine for him. Witness examined his mouth; his throat was eat away in places, and had large white blisters in it. Witness mopped it out several times. Defendant could not see well enough to dress and wash out his throat, and got witness to do it for several days before he died. Witness visited defendant every day or two, and never saw her mistreat Mack; she always acted towards him like a mother. He had had the bowel complaint ever since he had lived with defendant. When witness washed his throat, his jaws were swollen, and his throat was swollen on the outside. His feet also were swollen, and for weeks or months previously they swelled up at intervals. He digested nothing; his food passed right through him. Witness could not say what killed Mack, but thought his

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death a natural result from his sickness. Witness washed and dressed him after his death, and saw some black spots on his belly and chest. At first they were hardly visible, but got black very fast. Witness saw a few places on him as if he had been whipped. He died on Thursday, August 19, 1881, in the forenoon.

Dr. J. G. Eason, for the State, testified that he was a witness before the inquest held on the deceased, August 20, 1881. Witness made a partial examination of the corpse, and found it badly bruised on the chest and belly. The head was bruised, and there were pretty severe bruises all over the body. The throat was bruised internally, as shown by the color of the blood and flesh. Witness's opinion was that the boy's death was caused by these bruises. They could not have been made by his own weight or a fall. Some of them were a little older than others.

On his cross-examination the doctor stated that the boy's penis was covered with abrasions indicating inflammation. There were marks of violence on the boy, which the witness thought were signs of severe whipping. He seemed to be about seven years of age. The blood in his neck was of an unnatural color; choking might have been the cause. The witness was clearly of opinion that the boy's death was the result of violence. This completed the evidence for the State.

The first witness for the defense was Jesse Hill, the defendant's husband. They had been married eight or ten months when Mack died. He was a grandson of witness, and his father and mother were dead. After their death and that of witness's first wife, he got Mrs. Joe Jones to take care of Mack, and nurse and raise him; and when witness married the defendant, he took Mack home. When Mack died he was in his eighth year. He had had chronic diarrhoea, which became worse from time to time. In fact he had always been sickly. Witness never saw

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the defendant mistreat Mack in any manner, and she always treated him kindly. Witness had told her to correct Mack as she would her own child. When Mack died the witness was absent from home, and received a telegram from the defendant informing him of that fact. Defendant had also written to witness, but he did not get the letter in time to reach home before the child died. Mack could not retain his food; it passed through him like water. Whenever he ate a hearty meal he at once became worse, and sometimes would be confined to his bed for several days. His three brothers and sisters were sickly, and they, together with their father and mother, all died in one house within the same year. The last time witness saw Mack, which was about two weeks before his death, there were blisters in his mouth and throat, and his feet, hands and throat were swollen. His feet had long been in the habit of swelling at intervals. Defendant tried to keep him clean and nice, and to do the part of a mother by him. On his cross-examination by the State, the witness said he knew nothing about the defendant having whipped Mack a day or two before he died.

Mrs. Joe Jones, for the defense, testified that she had known Mack all his life. She also knew his father, mother, brothers and sisters; they all died within a single year and in the same house, one right after another, leaving Mack. His grandfather, Jesse Hill, after the death of his wife brought Mack to live with witness, who kept him until Jesse married the defendant. Mack was always puny and sickly, had diarrhoea, an unnatural appetite, and an inability to retain his food. While he lived with witness his throat, belly, hands and feet would occasionally swell up; she thought he had the dropsy.

Rev. Richard Bentley, a colored theologian, testifying for the defense, acknowledged that he knew the defendant and Mack, the decedent. On the Tuesday next preceding

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the Thursday on which Mack departed this life, the witness accompanied a friend to the railroad depot, and on their way they found Mack lying at a railroad trestle. He was crying, and said he had tried to jump from one railroad-tie to another, and had fallen. His mouth was bleeding, and witness's companion wiped it. He was lying on the track, and seemed very hot. They carried him into the shade of a neighboring tree, and got him a drink of water. He said he was hunting for the geese, and undertook to cross the trestle instead of going around it because he was in a hurry.

Dr. Terhune, an experienced physician, testifying for the defense, stated that ulcers in the throat were caused by a variety of diseases, such as scrofula, syphilis, chronic diarrhoea, and the like. When a child of eight years had such ulcers in the throat, accompanied with chronic diarrhoea for months, and occasional swelling of the feet, hands and throat, the time of its death was near at hand. Witness would expect such a patient to survive but a few days, and any excitement would accelerate death. He knew the trestle referred to by the witness Bentley. It was some ten or fifteen feet high, and, in witness's opinion, if a child of eight years, diseased as aforesaid, should receive such a fall from it as was in proof, death would be hastened and might be caused by the fall. Sometimes inflammation of the throat extends to the kidneys, and when it reaches the penis death is imminent. Chronic diarrhoea is very deceptive in its last stages; sometimes the patient will be up and about, making but little complaint, and often will be apparently well only a day or two before death, and then die suddenly. A sufferer from it sometimes has a morbid appetite and will gormandize, and too much food or water is very dangerous to such a patient, and may hasten death. Such a result might be hastened, if not occasioned, by a surfeit of sweet-meats. On his cross-examination the witness said

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that a severe whipping or choking of a child thus affected would hasten its death. On re-direct examination it was the witness's opinion that, if the child thus afflicted was severely whipped with a bundle of switches, then got a fall on a root, got up and walked away, next fell from a trestle and bruised his mouth and body, and about the same time overgorged himself with preserves, and death ensued, it would be almost impossible to specify the *causa mortis*. The disease alone might cause it, and the other things simply accelerate the disease and hasten death.

Dr. Stoddard, who also was a physician of experience, was introduced and examined by the defense. His testimony was of very similar import to that of Dr. Terhune, and therefore need not be given in detail.

W. T. Armistead, for the appellant. Under the first assignment of errors the proper definition of implied malice was not given to the jury, in this: the law does not presume malice from the act of killing *per se*, but implied malice is malice presumed by the law from certain deliberate and cruel acts, all of which must be found to exist by the jury, whose province it is to determine the grade of the offense. Does the law presume that there was a voluntary homicide, and that the killing was with deliberation, design, or cruelty? Implied malice can only be inferred by the jury from the facts and circumstances attending the homicide. *Jordan v. State*, 10 Texas, 479; *Tooney v. State*, 5 Texas Ct. App. 163; *Evans v. State*, 6 Texas Ct. App. 513; *Murray v. State*, 1 Texas Ct. App. 417; *Sharp v. State*, 6 Texas Ct. App. 650; *Harris v. State*, 8 Texas Ct. App. 90; *Hubby v. State*, 8 Texas Ct. App. 598; *Webb v. State*, 8 Texas Ct. App. 115; *Babb v. State*, 8 Texas Ct. App. 173.

II. The second assignment specifies the failure of the court to charge the number of years to be assessed as pun-

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ishment. The word *years* does not appear after *five* in the charge of the court. The charge must be correct as to the penalty, else the conviction cannot stand. *Buford v. State*, 44 Texas, 525; *Searcy v. State*, 1 Texas Ct. App. 440; *Allen v. State*, 1 Texas Ct. App. 514; *Garnett v. State*, 1 Texas Ct. App. 605; *Jones v. State*, 7 Texas Ct. App. 388; *Collins v. State*, 5 Texas Ct. App. 38.

If the charge errs as to the limitation in a felony case, it is fatal even though it be favorable to the accused. *Shoefercater v. State*, 5 Texas Ct. App. 207; *Davis v. State*, 6 Texas Ct. App. 133. "Five," not followed by any period of time, is too indefinite, and in fact fixes no time at all.

III. The court failed to charge on manslaughter. The instrument used by the appellant in whipping the child Mack was switches of ordinary size, and the jury should have been permitted to pass on the question whether the killing was murder or manslaughter. See art. 613, Penal Code. If death had not ensued from the alleged injury inflicted by the appellant on deceased, at most she could only have been convicted of an aggravated assault. *Yanez v. State*, 20 Texas, 656.

She was authorized to chastise her grand-stepson,—he having been placed under her charge by her husband, in whose care and custody the child was being raised,—and his parents being dead. What whipping was done was not laid on in a cruel manner, but was done under the influence either of sudden passion or with the desire to correct the child for disobedience and gluttony in the eating of the preserves. Hence the appellant might have been convicted of any grade of assault and battery. Art. 614, Penal Code.

If the circumstances even show a cruel or evil disposition, or that the appellant had the design to kill, she would be guilty of murder or manslaughter according to the means or instruments used, under the facts in

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proof. Art. 615, Penal Code. If the appellant had tortured and ill-treated the child, that of itself would not establish express malice. *Shelton v. State*, 34 Texas, 662. And in such a case the appellant should be permitted to prove any other hypothesis which would tend to her exculpation. *Bouldin v. State*, 8 Texas Ct. App. 332.

“If, in answer to a criminal charge, whether supported by direct or circumstantial evidence, the accused can affirmatively show but a single circumstance leading to the necessary inference that the crime charged could not possibly have been committed by him, it will be sufficient to overthrow the whole accusation, however clearly it may have been established.” Burrill on Circumstantial Ev. p. 511. “And circumstantial evidence is always insufficient if, assuming all the facts proved which the evidence tends to prove, some other hypothesis may still be true,” etc. 1 Stark. Ev. p. 573.

We submit that the accused by proof showed five hypotheses wholly inconsistent with her guilt.

(1) She proved her uniform kindness towards and motherly care for the deceased child.

(2) She proved that the deceased has been suffering from chronic diarrhoea and was in the last stage of the disease, approaching dissolution, when she whipped him with the switches.

(3) She proved that a child of the deceased's age—seven years—afflicted with chronic diarrhoea would have its death hastened, if not occasioned, by gormandizing preserves, as was undisputed in this case.

(4) She proved that a fall on a trestle, as described, would also hasten if not produce death.

(5) And that the deceased's death may have been produced from a natural cause—the disease with which he was afflicted;—and that his death may have been occasioned from either one of the causes enumerated.

In view of all the record in this case we suggest that

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an old grey-haired woman, who had raised two families of children and has married her third husband, in her declining age, and against whom only colored nymphs of the pave with whom she would not hold any communication could speak a word inculpatating her, was not guilty of an intentional wrong, and is entitled to a reversal of the judgment against her.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. As viewed in the light of the evidence before us the facts connected with the homicide charged are substantially these, viz.: Mack, the deceased, a boy of some seven years of age, was the step-grandson of appellant. His parents were dead, and for some time prior to his death he had been residing with his grandparents. He was extremely delicate, having suffered from chronic diarrhoea, ulcerated sore throat, and swollen limbs. Experts who testified to a diagnosis of the case at the trial thought his ailments might have been caused by scrofula or hereditary syphilis, and, taking the symptoms as testified by the other witnesses as criteria for their opinion, concluded that his condition was critical, and death from these diseases imminent and likely to ensue at any time. The boy, however, was able to walk about and go errands.

Emeline Cole, the principal witness for the prosecution, testified: "On Tuesday, the 17th of August, 1881, before the child died the next Thursday, I was passing her (Sally Hill's) house about 11 o'clock, A. M., and called to her to come with me to see a house close by, which I wanted to rent from Mr. Taylor. As aunt Sally came out of the yard she told Mack not to meddle with or take any of the preserves she had been making. When we came back a short time thereafter, the child had his pockets filled with the preserves, and his hands and mouth and cloth-

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ing were besmeared with them. Aunt Sally then asked him why he had acted so, and he denied it. She then got some switches from a peach tree in the yard and whipped the child with them, but I cannot say how long she whipped him. She then caught the child by the throat and neck with both hands and choked him, raised him up and threw him down, and when she let him loose he fell, striking his head against a root. She shook him as she held him, with both hands. I had told her some days before she whipped the child that he was sick, and she ought to give him some mullein tea. I was about six feet from the root the child's head struck. He is dead. He made two attempts to get up before he succeeded. Defendant stated at the time she hoped the child would die, and hoped that it would be dead next morning. Witness saw the child after it was dead and before; it was mightily bruised; could not lay your finger down for stripes. This happened the day before the child died."

Another witness for the State testified that on Wednesday evening, the day of the whipping and choking, Mack was at her house at dusk.

For the defense, amongst other matters, it was proven by one Bently that on the Tuesday before the child died he and another party found Mack at the trestle on the railroad. He says, "we found Mack lying there crying. We talked to him and he said he had fallen on the trestles, that he had tried to jump from one tie to the other, and had fallen. His mouth was bleeding and brother Mitchell wiped it off. Mack lay in the track when we came up. He seemed very hot, and we wiped him and carried him into the shade of a tree near by, and got him some water to drink from a house close by."

Dr. Eason, who was present when the coroner's inquest was held upon the dead body, testified: "I made a partial examination of the body. I found it badly bruised on the chest and belly, and bruises on the head and pretty

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severely all over his body. I found his throat internally bruised, as shown by the color of the blood and flesh, and it is my opinion that the death of the boy was caused by the effect of these bruises. The bruises could not have been made by his own weight or a fall. Some of the bruises were a little older than the others. I found the penis of the boy covered with abrasions, showing signs of inflammation. I found marks of violence on the body of the boy. He seemed to be about seven years old. From the marks on the body I took it they were signs of his having been severely whipped. The blood in his neck did not have its natural color. Choking might have caused it. From all of the signs of violence on the dead body, I am clearly of the opinion that they produced the death of the boy."

The theory of the defense was that death and the bruised appearance of the body were superinduced by disease, or the complication of diseases, from which he was suffering, and his fall upon the railroad trestles. There was also evidence adduced showing uniform kindness on the part of appellant towards the deceased whilst he lived with her.

The motion for a new trial was mainly based upon supposed errors of omission and commission in the charge of the court. Of commission, the errors complained of were as to implied malice and circumstantial evidence. Neither of these grounds are well taken. When the fact of unlawful killing is proved, and no evidence tends to show express malice on the one hand or any justification, excuse or mitigation on the other, the law implies malice and the offense is murder in the second degree. This doctrine is now well settled in this State. *Harris v. State*, 8 Texas Ct. App. 91. Upon circumstantial evidence the charge is fully supported by the approved authorities. *Barnes v. State*, 41 Texas, 342; *Black v. State*, 1 Texas Ct. App. 391; *Hunt v. State*, 7 Texas Ct. App. 213.

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Of omission, the errors indicated are the failure to give the period of punishment of murder of the second degree, failure to charge manslaughter, and the failure to charge certain statutory provisions applicable to the state of facts made by the evidence. As to the punishment of murder in the second degree, the charge reads: "If you find the defendant guilty of murder of the second degree, you will so say by your verdict and assess her punishment at imprisonment in the penitentiary for any period of time in your discretion not less than five." The word "*years*," which should have followed the last word "five," is omitted. This omission, however, could not possibly have confused or misled the jury. The word *years* would naturally and irresistibly supply itself from the context.

Nor did the court err in declining to charge the law of manslaughter. "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from *an adequate cause*, but neither justified or excused by law." Penal Code, art. 593. There can be no manslaughter unless predicable upon "*adequate cause*," which is the essential element in determining that crime. *McKinney v. State*, 8 Texas Ct. App. 627. In the case before us we look in vain for the slightest tittle of evidence going to establish any semblance of adequate cause.

In our opinion the main question and the most serious one suggested by the statement of facts was whether or not the appellant *intended to kill deceased*, judging her act by the means used and the manner of doing it. Certain statutory rules have been prescribed as aids to the solution of such questions. It is provided that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." Penal Code, art. 612.

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“Art. 613. If any injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing will be manslaughter or murder according to facts of the case.”

“Art. 614. Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide unless it appears that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.” See also *Dones v. State*, 8 Texas Ct. App. 112.

Now, whilst the otherwise admirable charge of the court submitted the issues arising under the provisions of articles 612, 613 and 615, which apply to cases where *the intention* evidently appears, or where it is evidenced by the cruelty of the manner in which the injury was inflicted, it did not submit the alternative proposition presented in article 614, *supra*, as to the law where there was no intention to kill and the homicide was divested of the elements of an evil and cruel disposition. From a careful investigation of all the facts as they are stated in the record, we are of opinion that defendant was entitled to have this view of the law submitted to the jury in a plain, pointed and affirmative manner. If she was not actuated by an intention to kill, or by an evil or cruel disposition, then the killing could not be murder, and her offense might have been reduced to any grade of assault and battery.

For this error of omission in the charge, the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

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WILLIAM ARNOLD *v.* THE STATE.

1. SWINDLING — INDICTMENT.— The enactment of March 26, 1881, commonly called the "Common-Sense Indictment Act," dispenses, in indictments for swindling, with the previously required averments of the falsity of the pretenses and the guilty knowledge of the accused. Therefore, those averments are not necessary in an indictment for swindling presented since that act took effect.

ON REHEARING.

2. SAME.— THE "COMMON-SENSE" INDICTMENT ACT is not retroactive, and does not cure defects in indictments which were presented prior to the time when said enactment took effect.

APPEAL from the District Court of Navarro. Tried below before the Hon. L. D. BRADLEY.

The indictment was presented in January, 1881, and charged that the appellant represented himself to be the owner of two work-oxen, and thereby induced A. J. Bell to sell and deliver to him a certain horse, and to accept a mortgage on the oxen as security for the price of the horse. Appellant was found guilty, and a term of two years in the penitentiary was assessed as his punishment.

There is no statement of facts in the record.

J. F. Stout, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of swindling.

1. The indictment fails to charge that appellant knew the pretenses were false, or that they were knowingly made. 2. The indictment does not allege by direct averment that the pretenses *were false* or untrue. These omissions have been held by a number of decisions to be fatal to the sufficiency of the indictment.

The indictment in this case, however, was presented since the passage of "An act to prescribe the requisites of indictments in certain cases." The requisites prescribed in this act for swindling are that the accused did falsely represent to ——— that he had property, and by

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means of such false representations did obtain from said ——— money, goods, or valuable writing, with intent to appropriate it to his own use. The indictment in this case, tested by the requisites of this form, is sufficient; the prerequisites therein being all contained in this indictment. A majority of this court holding that an indictment for this offense which meets the requirements of this form is sufficient, and as this indictment does that, the court below did not err in not arresting the judgment.

There is in the record neither a statement of facts nor a charge of the court; hence the other supposed errors cannot be revised. The judgment is affirmed.

[After the above opinion was rendered, the appellant's counsel moved for a rehearing on the ground, in substance, that the indictment was presented before the "Common-Sense" Indictment Act took effect. That enactment was not an emergency act, and did not take effect until ninety days after April 1, 1881, when the 17th Legislature adjourned. The motion for a rehearing was granted, and elicited the following opinion.—REPORTERS.]

HURT, J. This motion for rehearing is granted. We were laboring under the belief that the indictment was presented subsequent to the last act of our Legislature on the prerequisites of indictments. This was a mistake. This indictment was presented before this act went into effect, and its sufficiency must be tested by the law in force at the time of its presentation. If not sufficient then, the passage of an act subsequent thereto, under which this indictment would be held good, does not relate back and cure that which was defective when presented.

The defects of the indictment are pointed out in the opinion in which the judgment was affirmed. The motion for rehearing is granted, and upon the merits the judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

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29 454M. CARMISALES *v.* THE STATE.

EXTRA-TERRITORIAL OFFENSES — INDICTMENT.—The Penal Code, articles 798-9, makes provision for the punishment of robbery, theft, and the knowingly receiving of stolen property, though perpetrated in a foreign country, if the property was brought into this State; provided that by the law of the foreign country the inculpatory act would have been the offense charged in the indictment. *Held*, that the law of the foreign country is an issuable fact in such cases, and should therefore be alleged in the indictment.

APPEAL from the District Court of Webb. Tried below before F. E. McMANUS, Esq., Special Judge.

The indictment charged that Bruno Rosales, Nicolas Ortiz, and Mauricio Carmisales, the appellant, on or about March 8, 1881, “in the State of Nuevo Leon, and in the Republic of Mexico, did then and there commit the offense of theft of horses and of property over the value of twenty dollars in lawful money of the United States, by then and there unlawfully and fraudulently taking and stealing from and out of the possession of one Vicente Rodriguez, of the property of said Vicente Rodriguez, two certain horses and three carbines of the value of twenty-five dollars each in the lawful money of the United States, said stealing being then and there done without the consent of the said owner of the said property, and to appropriate it then and there to the use and benefit of them the said persons so as aforesaid taking the same. And the grand jurors further find and present that the said Bruno Rosales, Mauricio Carmisales, and Nicolas Ortiz, on or about the said 8th day of March, A. D. 1881, after the said unlawful taking and stealing of the above described property as aforesaid, did then and there unlawfully and feloniously bring the said property, so as aforesaid stolen, from and out of the State of Nuevo Leon in the Republic of Mexico into the county of Webb in the State of Texas. And so these grand jurors

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do find that the said Bruno Rosales, Mauricio Carmisales and Nicolas Ortiz, on or about the 8th day of March, A. D. 1881, did unlawfully and feloniously take and steal the above described property in the State of Nuevo Leon in the Republic of Mexico, and did then and there, on or about said 8th day of March, A. D. 1881, unlawfully and feloniously bring said stolen property into the county of Webb and State of Texas; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

To this indictment no exceptions were taken *in limine*, and the cause went to trial on the plea of not guilty, resulting in a verdict of conviction and the assessment of the defendant's punishment at a term of five years in the penitentiary. The defense filed a motion in arrest of judgment because, among other reasons, the indictment failed to aver that the offense charged was a crime under the law of Nuevo Leon or the Republic of Mexico. The motion was overruled, a new trial refused, and the defendant appealed.

No brief for the appellant has reached the Reporters.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. With regard to bringing stolen property into this State from another country or State the statute provides: "If any person who shall have committed an offense in any foreign country, State or Territory which, if committed in this State, would have been robbery, theft, or receiving of stolen goods or property knowing the same to have been stolen, shall bring said property into this State, he shall be deemed guilty of robbery, theft, or receiving of stolen goods knowing the same to have been stolen, as the case may be, and shall be punished as if the offense had been committed in this State." Penal Code, art. 798.

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But, to be good or sufficient in charging this offense, the indictment should aver and allege that the act charged to have been committed was a criminal act by the law of the State where committed. "The law of the foreign State becomes a necessary element in proving the guilt of the accused, and ought therefore to be averred." *State v. Morales*, 21 Texas, 298.

Because the indictment in this case is fatally defective under the above stated rule, the judgment is reversed, and the case as in the manner prosecuted is dismissed.

Reversed and dismissed.

G. E. AND R. J. WHITE *v.* THE STATE.

1. THE "COMMON-SENSE" INDICTMENT ACT.—The principal change effected in indictments by the act of March 26, 1881, "to prescribe the requisites of indictments in certain cases," is to obviate the requirement of circumstantial allegations. It does not affect the evidence necessary to establish the inculpatory facts.
2. RETAILING LIQUOR.—INDICTMENT charged that the defendants did, "acting together and with each other, unlawfully sell intoxicating liquors to A. J. Dawson, without having obtained license therefor." *Held*, a good indictment under the act of 1881, "to prescribe the requisites of indictments in certain cases." A sale of any quantity might be proved by the State, to establish the offense.
3. SAME—EVIDENCE.—At the trial of merchants on an indictment which charged the sale of liquor to one D., the proof showed that the sale to D. was made by a clerk of the defendants in their absence, but failed to show their complicity in the sale. *Held*, that it was error to allow the State, over objections by the defense, to prove that the clerk also sold liquor to others beside D., in the absence of the defendants.
4. PENALTY—CHARGE OF THE COURT.—For selling liquor without license the penalty prescribed is a fine not less than the taxes due nor more than double that amount. When there was no proof that any taxes were due to the county, it was error to so instruct the jury as to allow them to assess a higher fine than double the taxes due the State.

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APPEAL from the County Court of Waller. Tried below before the Hon. H. C. TOMPKINS, County Judge.

The indictment was as follows: "In the name and by the authority of the State of Texas, the grand jury of Waller county present in the District Court of said county that, about the 18th day of September, A. D. 1881, in Waller county, Texas, G. E. & R. J. White did, acting together and with each other, unlawfully sell intoxicating liquors to A. J. Dawson, without having obtained license therefor; against the peace and dignity of the State."

The defense moved to quash the indictment because, among other reasons, it does not set forth the offense with which the defendants are charged, in plain and intelligible words, and because it does not show the quantity of intoxicating liquors defendants are charged with having sold. The motion was overruled, and the defense reserved exceptions.

The trial proceeded on the plea of not guilty, and A. J. Dawson testified that, about September 18, 1881, he bought from one Terrill, in the store of defendants where he was acting as clerk, a bottle of Home Sanative Cordial or medicated bitters, which he bought partly as medicine and partly because he liked something of the kind before breakfast. It was intoxicating; witness had seen men drunk from drinking it. Over objection by the defense, the witness further stated that he had repeatedly seen the clerks in the defendants' store sell these bitters, and also brandy-cherries, to certain other persons, who got drunk on the fluids. Witness had never seen defendants sell anything of the kind, nor was either of them present when witness saw any of their clerks sell the beverages named.

Another witness for the State was allowed, over objection by the defense, to testify that he had often bought

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Home Sanative Bitters, and brandy-cherries and peaches from the defendant's store, and had made such purchases during the month of September, 1881.

The State proved that the defendants had obtained no license and had paid no tax for sale of liquors during the year 1881. There was no proof whether any county tax had been levied or was due; but the jury were instructed that in case they found the defendants guilty, and that the liquor sold was not less than a quart nor more than five gallons, they could assess the fine at not less than \$300 nor more than \$600,—an instruction which no doubt assumed a county levy of fifty per cent. on the State occupation tax. The jury found a verdict of guilty and fixed the fine at \$300.

T. S. Reese, for the appellants.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The indictment charges that, in Waller county, about September 18, 1881, the defendants "did, acting together and with each other, unlawfully sell intoxicating liquors to A. J. Dawson, without having obtained license therefor, against," etc.

The indictment is sufficient to charge the offense therein set out, agreeably to the provisions of the act of March 26, 1881, entitled "An act to prescribe the requisites of indictments in certain cases." Pamphlet Laws of the 17th Legislature, p. 60. The 5th section is as follows: "In an indictment for selling intoxicating liquors in violation of any law of this State, it shall be sufficient to charge that the defendant sold intoxicating liquors contrary to law, naming the person to whom sold, without stating the quantity sold. Under such indictment, any act of selling in violation of law may be proved."

In section 11 is found Form No. 1, which relates to the merely formal parts of indictments, generally. It is fur-

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ther provided, in section 12, that "Nothing contained in the 11th section of this act shall be construed to dispense with the necessity for proof of all the facts constituting the offense charged in an indictment, as the same is defined by law." The most important change in the act of March 26, 1881, is to relieve the criminal pleader of the necessity of alleging in indictments the details of the circumstances which go to make up the general offense intended to be charged, and thus changing the circumstances from matter of pleadings to matter of proof. Under section 12, however, it is still the law that the testimony must show all the facts constituting the offense charged in the indictment, as the same (that is the offense) is defined by law. The general offense charged is matter of pleading; the details are matter of proof.

Under this indictment, therefore, the State would have been permitted to prove a selling in quantities of a quart or less, or more than a quart and less than five gallons, or at either wholesale or by retail, and in fact any kind of selling of spirituous liquors for the sale of which an occupation tax is imposed by law.

The court erred in permitting the prosecution to prove a sale to other persons than the one to whom the selling was charged in the indictment. This is a case in which intent does not enter. It is an offense punishable by law to do the act prohibited by the law, and does not involve the question of intent. As a general rule it is only in cases which are *mala in se* that proof of kindred offenses is admitted, and then only for the purpose of establishing the guilty intent of the person accused. Such proof would be admissible for that purpose in a case which is *malum in se* and in which the intent enters into the crime, but not in a case which is purely *malum prohibitum*. If there had been a question as to whether the selling by the clerk was within the knowledge of the appellants, or within the scope of the clerk's general instructions, it

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would then have been admissible evidence to show the knowledge of the principals by circumstantial testimony, such as a sale to other persons. *Gilbraith v. State*, 41 Texas, 567.

There was also error in the charge of the court in stating the amount of the fine. The penalty imposed by law is not less than the amount of the tax imposed, and not exceeding double that amount. It seems from the current of the testimony that the defendants were being prosecuted for selling in quantities of a quart and less than five gallons. The tax imposed for this class of selling is two hundred dollars. There is no proof as to what per cent. of the State tax had been levied for the county; hence it was improper under the proof to charge a higher penalty than double the amount of the State tax, in the absence of proof as to the amount of the county levy.

For these errors the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

E. EPPSTEIN v. THE STATE.

1. INDICTMENTS presented prior to the time when the Common-Sense Indictment Act of 1881 took effect cannot be tested by that enactment.
2. WHOLESALE LIQUOR SELLING.—The charging part of an indictment filed June 28, 1881, alleged that the accused pursued the "occupation of a wholesale liquor dealer, and did then and there sell spirituous, vinous and other intoxicating liquors in quantities of five gallons and more than that amount, without first obtaining license therefor by payment of the State tax fixed by law upon said occupation; against," etc. *Held*, that the indictment was fatally defective under the law in force when it was presented. And even under the Common-Sense Indictment Act it would be insufficient because it fails to allege the name of the person to whom the sale was made.

APPEAL from the County Court of Grayson. Tried below before the Hon. S. D. STEEDMAN, County Judge.

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The opinion states the case. A jury was waived and the cause submitted to the court. Appellant was found guilty, and his punishment was assessed at a fine of \$200. He moved in arrest of judgment on the ground that the indictment charged no offense, and because the amount of the tax was not alleged in the indictment. The motion was overruled, a new trial refused, and he appealed.

Hare & Head, for the appellant.

O. S. Eaton, Acting Assistant Attorney General, for the State.

I. An occupation tax for selling liquors in quantities of five gallons or more is a specific tax under the statute, and is not embraced in the tax exacted "from every merchant." Rev. Stats. art. 4665 *et seq.*

II. It is shown, 1. That appellant was a wholesale dealer in wines, liquors and cigars at the time mentioned in the information; and 2. That appellant had not paid the tax of two hundred dollars unless the drummers' tax receipt was such payment.

III. The payment to the comptroller of a drummers' tax of two hundred dollars did not include the occupation tax levied upon every person or firm selling liquors in quantities of five gallons or more; the payment of the former did not exempt from the payment of the latter. Rev. Stats. art. 4665 *et seq.*

IV. The exact penalty is fixed by general law and is a matter of judicial knowledge. Rev. Stats. art. 4662; Penal Code, art. 110; *Viser & Carson v. State*, 10 Texas Ct. App. 86.

WINKLER, J. The information upon which this prosecution was based, after appropriate formal averments, charges that, in the county of Grayson, on October 1, 1880, the defendant "did then and there pursue the occupation of

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a wholesale liquor dealer, and did then and there sell spirituous, vinous and other intoxicating liquors in quantities of five gallons and more than that amount, without first obtaining a license therefor by payment of the State tax fixed by law upon said occupation."

It can hardly be necessary to quote authority to show that under the laws heretofore in force in this State — that is, the laws prior to the passage of the act of March 26, 1881, the information would not sufficiently describe the offense attempted to be charged.

The information was filed prior to the time the act known as the common sense indictment bill (act of March 26, 1881) went into effect, which was ninety days after the adjournment of that session of the Legislature. The Legislature adjourned on the first day of April, 1881. The information and the complaint were filed on June 23, 1881. From the first day of April to the 23d day of June was less than ninety days; so the common sense bill was not in force at the time the prosecution was commenced, and the indictment cannot be tested by it. Even under that bill it would not be sufficient, in that it fails to name the person to whom the spirits were sold. Acts of 1881, sec. 5, p. 60. This section relates to and embraces every case of selling intoxicating liquors in violation of any law of this State, but requires that the name of the person to whom such sale may have been made shall be stated in the information or indictment. *White v. State*, ante, p. 476.

Other errors complained of need not be noticed. Because the information is insufficient the judgment will be reversed and the case dismissed.

Reversed and dismissed.

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PAT LUM v. THE STATE.

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1. **PRACTICE — IMPEACHMENT OF WITNESS.**—In a trial for murder it appeared that B., a State's witness, at the time of the homicide lived in the locality where it was committed, but that he had been living in an adjoining county for two or three years before the trial. Assailing his general reputation for truth, the defense asked the impeaching witnesses if they knew what that reputation was when he lived where the homicide was committed. On objection by the State the trial court disallowed the question, and ruled that the inquiry should be restricted to the time of the trial. *Held*, that the question was a proper one, and the ruling erroneous. The presumption in favor of the continuance of an established *status* obtains with regard to a witness's reputation for truth, notwithstanding the lapse of three years.
2. **CHARGE OF THE COURT** is measurable by the evidence, and need not transcend the legitimate deductions therefrom.
3. **JURY LAW — PRACTICE IN THIS COURT.**—If the defendant had not exhausted his peremptory challenges when the panel was filled, it is not material on appeal that his challenges for cause were erroneously overruled by the trial court.
4. **INDICTMENT.**—Being found guilty of murder the defendant moved in arrest of judgment because the indictment charged one G. as well as himself with the crime, and then stated that it was not intended thereby to charge the said G., inasmuch as he was separately indicted for the same offense. *Held*, that, as the indictment was good so far as appellant was concerned, his motion in arrest was properly overruled.
5. **FACT CASE.**—See evidence in a murder case held sufficient to identify the body of the deceased, and note a state of proof held not to necessitate instructions to the jury on the law of manslaughter.

APPEAL from the District Court of Liberty. Tried below before the Hon. EDWIN HOBBY.

This appeal is from the conviction of Pat Lum, the appellant, for murder in the second degree, and the assessment of a term of fifteen years in the penitentiary. It was charged in the indictment that he and Ed. Green, on April 1, 1875, of their malice aforethought, did kill and murder one William Churchill by stabbing him on the back and shoulder. Following the charging allegations

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was a clause, viz.: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present to said court that the said Ed. Green being presented to said court, for the same offense herein charged, in a different indictment, it is not the intention of said grand jurors to charge him herein with said offense." After the verdict was rendered the defense moved in arrest of judgment because of this clause in the indictment, and, the motion being overruled, reserved exceptions.

The case came to trial at the fall term, 1881, of the District Court of Liberty county. It is disclosed that the defendant made his escape soon after the disappearance of William Churchill, who was a stranger in that section of country. One witness thought he was an Englishman, and another spoke of him as an Irishman, and it is incidentally disclosed that he had for a short time been in the employ of Ed. Green or his father.

The testimony at the trial was elicited from a number of witnesses, mostly introduced by the prosecution for the purpose not merely of proving the homicide but of identifying a certain body found in the woods as that of William Churchill. Only the most salient portions of this testimony are quoted or summarized in the opinion of this court, and there is much more which seems necessary to elucidate the case.

Pat Byrne, the first witness for the State, and the only eye-witness of any of the incidents directly relied upon by the prosecution to inculcate the defendant, was a youth of not quite sixteen years of age in March, 1875, when, as alleged in the indictment, the homicide was committed. His father, M. Byrne, and the family then lived about six or seven miles west of the town of Liberty, and on a public road leading to the town from the neighborhood in which Ed. Green and the appellant lived. About a mile from the town the road crosses the Trinity river, where there was a ferry.

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The witness stated that in the morning of March 13, 1875, the defendant, the deceased, Ed. Green and a negro boy named Aaron Whitley passed the Byrne homestead, on horseback, going towards the town of Liberty; and in the evening of the same day, while witness was in the woods looking for a horse, and about a mile from home in the direction of the town, he saw the same persons passing back. Churchill's face was then bleeding. They were talking as though they were quarreling, and this first attracted the attention of witness, who was then not more than twenty steps from them. The negro boy was in front, Ed. Green next, and the deceased and defendant in the rear. They passed out of witness's sight behind some underbrush and a turn in the road, and while thus screened from his view he crossed the road, from whence he again saw them as they got into an open place. He then saw Pat Lum, the defendant, who was about half a horse's length behind and on the left of Churchill, reach over and strike the latter in the back, and a little below the shoulder-blade, as it seemed to witness. Witness saw no knife. The quarreling had continued until the blow was struck. It does not appear that the witness saw Churchill fall from his horse, or observed the immediate effect of the blow; but he stated that he then saw Ed. Green and the defendant dragging the body off in the woods on the opposite side of the road from him and out of his sight. This occurred about an hour before sunset. The body was afterwards found by John Stiles and witness's father in the same direction he saw it dragged, and about a mile from his father's, and 115 or 120 steps from the road. Witness was not acquainted with Churchill, the deceased, and saw him for the first time that morning, as he and the others passed the house of witness's father on their way towards Liberty. Witness was in the smoke-house when they passed and saw them plainly through a crack in the house, which was

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only about ten steps from the middle of the road. The body was found thirteen days after witness saw the defendant and Green dragging it off. From the place where he saw the blow he, without finding the horse, went straight home, and daylight was nearly gone when he reached there. Defendant, the negro and Green had passed the house a little while before witness got back there. Witness, when he got home, told what he had seen to no one but his mother, and she told him to tell no one else, and threatened to whip him if he even told his father. She was not in good health, and remarked that she did not want to be troubled going to court. Witness's father was not informed of what witness had seen until after defendant had made his escape, and then learned it from witness's mother and came and asked witness about it. It was not on information derived from witness that his father and Stiles looked for the body in the locality where they found it. After dark on the Wednesday next before the Friday on which the body was found, Ed. Gill and Mr. Tuller came, and the former asked witness's father if he knew anything about the man who went to town with the defendant, the negro boy and Green, and said that the man was missing and was supposed to have been killed by the others. After Gill left, witness heard his sister call his father's attention to the fact that he had spoken of the last Saturday when he should have said last Saturday a week. Witness did not see the body the day it was found. From the first view witness had of defendant and the others in the evening of March 13th, until they passed up the road towards his father's, five minutes or more elapsed; they remained a few minutes under the hill where they dragged the body, and then returned, got on their horses and rode off. Witness did not go about Rose's house that day. He was positive that the man struck by the defendant was the same man he saw in the morning riding towards Liberty with Green,

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defendant, and the negro boy, and who, as he afterwards learned, was named William Churchill. Witness, at the time of the trial, was living at Beaumont, in an adjoining county, and had been away from Liberty county about three years. His father and the family had remained in the latter county but a short time after he left it.

M. Byrne, the father of the preceding witness, testifying for the State, said that he saw the defendant and the deceased with Ed. Green and the negro boy, when they passed his house in the forenoon of March 13, 1875, going towards the town of Liberty. He had previously seen the deceased when the latter had stopped at his house and inquired the way to Ben Green's, the father of Ed. Green. He thought Churchill, the deceased, was an Englishman; he seemed between twenty-seven and thirty years of age, and had black hair and blue eyes, and on the day mentioned was riding a bay horse. In the afternoon of the same day the defendant, with the negro boy and Ed. Green, returned by the house of witness, and Green was then leading the horse which the deceased was riding in the morning. Before they came by in the evening, the witness and others of his household heard fearful screams in the direction of the town of Liberty, and from a distance, he thought, of about a mile. Thirteen days afterwards he and John Stiles found Churchill's body about the place from which the shrieks came, and about a hundred paces from and north of the public road. The body was first found by Stiles. It was lying on its left side. Behind the left shoulder blade was a cut about four inches deep, and there seemed to be a knife-cut near his mouth, and the mark of a blow upon the head. The body was much swollen and very offensive, but witness saw it was the body of the same man who rode by his house in the forenoon of March 13th, along with Green, the negro boy and the defendant. One night Ed. Gill and Barney Tuller

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came to witness's house and Gill told him that the man Churchill was missing and they were looking for him, and said that the defendant, and Ed. Green and the negro had apparently killed Churchill for his money. Witness told Gill that the boys (defendant and the other two) had passed his house, but did not tell Gill about the screams he heard. Some of witness's children were awake when this conversation passed between him and Gill. Witness told John Stiles and William Simpson of the screams, about March 26th. To Ben Green's from where the body was found, there was a nearer way than by witness's, but it was a very bad way. It was three or four o'clock in the afternoon when Stiles and witness found the body. They found on it no money, and nothing but a box of matches and part of a comb. It appeared to have been lying there about two weeks.

John Stiles, testifying for the State, gave a similar account of the search for and the finding of the body to that given by M. Byrne. He had never seen Churchill alive, but thought a person who knew him well could have recognized the body.

William Jackson, for the State, testified that on the day the defendant was said to have killed Churchill he met them and their companions about three hundred yards west of the ferry on the Trinity river, and last saw them at Rogers's place, which is about a mile from the ferry. They were going up the road toward M. Byrne's, and towards the place where the body was afterwards found, which was about three miles from Rogers's. When they met, witness and they took a drink. Churchill rode by, and it appeared that he and the ferryman had had a difficulty. Something was said and Churchill gave it the "d—n lie." Pat Lum, the defendant, said "Do you give me the d—n lie, sir?" The party then took another drink. After that the others went on, and witness saw the defendant whipping Churchill with a switch. The

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latter stood and took it, saying nothing and offering no resistance. At Rogers's all dismounted and got water, except Churchill; witness carried some water to him, and he then said to witness, "Mister, this is mighty bad, but I reckon it will be all right." A week from that day the witness rode up to Mr. Ben Green's, and the defendant and Ed. Green came out. Witness said to them,—“Boys, they will give you fellows hell about that fellow.” They said they had not seen the man Churchill since he fell off his horse at the Black Hill, which witness understood to be about two miles from Byrne's towards Liberty. Witness had never seen Churchill since they parted at Rogers's, and thought the sun was then not more than half an hour high. Recurring to what transpired at Rogers's, the witness stated that Churchill said it was hard to bear but he would make it all right. Defendant said that Jim Peters, the ferryman, had knocked Churchill down, and witness asked the latter if he let that fellow hit him; to which he replied that any one who said so told a G—d d—d lie. So far as the witness knew, the party were all friendly when they left Rogers's. Defendant said he was not going to bother Churchill any more, but witness did not see them make friends with each other. As friendly advice to the defendant the witness told him not to take any knife to the man. Old Scott Baldwin's was the next house, and Byrne's the second, in the direction they were going. It may be remarked that though the witness spoke of “meeting” the party, it is apparent that he and they were going in the same direction between the ferry and Rogers's.

S. De Blanc, who was sheriff of Liberty county in 1875, testifying for the State said that for a week after he heard of the homicide he was out night and day hunting for Ed. Green and the defendant, without success. He next heard of the defendant being in jail at Houston in Harris county, and, going there, received the defendant from sheriff Ashe of that county, and also a knife which Ashe

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said he got with the defendant, and that it was full of blood when he got it. Witness could not himself say that there was blood on the knife, but it was rusty. He brought the defendant to Liberty, but while his examining trial was going on he escaped from one of witness's deputies. Witness understood that defendant gave himself up when last taken into custody. Witness wrapped up the knife and gave it to Esq. Lacour, the justice of the peace.

M. Byrne, recalled by the State, said that the 13th of March, 1875, was a beautiful but cold day, and that the general temperature of the weather continued cold until the body was found.

Mrs. M. Byrne was introduced by the State, and corroborated the testimony of her husband and son as to the parties who passed and returned by their house on March 13, 1875. She also heard the screams in the afternoon mentioned by her husband, but said they were about an hour before sunset, and that it was getting dark when Green, the negro boy and the defendant passed the house in the evening. When they went by in the morning her son Pat was in the smoke-house. Miss Byrne testified to the same general effect as her mother, but said she did not hear the screams.

J. M. C. Lacour, for the State, said that the knife delivered to him by De Blanc, the former sheriff, was a dirk-knife; it was rusty and looked like it had been stained with blood. He gave it to Jesse Lum, the defendant's father. Witness held the inquest over the body, between ten and eleven o'clock in the night, and at that hour he could not have recognized his own son in the condition the body was in. The body, however, was that of a white man, who, witness thought, had blue eyes and sandy hair. The wound on it was just below the shoulder blade, and there was a broken place in the face.

Pat Byrne, recalled by the State, said that Churchill

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screamed when the defendant reached over and struck him. Witness was about sixty yards off when the blow was struck.

W. W. Perryman, for the State, testified that he was farming in 1875, and kept a diary in which every change in the weather was correctly noted, and by which it appeared that on the 12th of March, 1875, it rained, on the 15th it was cool, and on the 16th there was frost, and the weather did not turn warm until the 27th.

— Jones, for the State, testified that he had seen Churchill two or three times while the latter was working at a saw mill on Cedar bayou. Prior to the report of his death he was said to be living and farming with Ed. Green. Witness had not seen Churchill since he was reported killed.

Mr. Bristley, for the State, testified that he was in the grocery business at Liberty in March, 1875, when Churchill was said to have been killed, and, on the day of that event as reported, the defendant and Ed. Green, with a man whom witness afterwards learned was Churchill, came to witness's store, and afterwards left there together. Churchill had some silver and gold in his pocket-book,—a five-dollar gold piece, witness thought, and some silver. The man Churchill paid for drinks for the party. It was late in the afternoon when they left the store of witness, and he could not say where they went.

James Ricks was the first witness introduced by the defense. He was the ferryman on the Trinity river about a mile from Liberty at the time Churchill was killed. A while after dinner on the day of that event the witness set the defendant, the deceased and Ed. Green across the river. Witness stated that the sun was not more than half an hour high when he set those men across the river on their way home. He walked with the defendant about three hundred yards to the corner of Dick Rives's

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fence, and stopped there a while in conversation with defendant. While they were there Churchill rode up.

Paul Servat, for the defense, stated that the defendant, and Ed. Green, accompanied by Churchill, were at his store in Liberty the day the latter was killed, as reported. Churchill bought a can of oysters, and asked the others to eat, but they declined. Witness thought the sun was an hour and a half or perhaps two hours high, when they left his store. He thought it was in August, 1875, but acknowledged that he could not remember well.

Scott Baldwin, who said he was a hundred and seventeen years old, testified for the defense that he lived two miles west of the ferry, and saw the defendant, a negro boy, Ed. Green and an Irishman when they passed his house in the evening, "a little between dark and daylight." The others stopped at the corner of witness's fence for the Irishman to come up. Witness denied that when he testified at the examining trial he stated that the sun was an hour and a half high when the parties passed his house. Nor did he remember testifying that the defendant was beating the Irishman, or that blood was coming from the latter's face. Neither did he recollect stating that the others proposed throwing the Irishman in the river, and he, the witness, begged them not to do so. Witness acknowledged that his memory was short.

— Rose, for the defense, stated that, on the day Churchill was said to have been killed, he, the witness, was returning from Liberty to Byrne's place, on which he then lived, and between the town and the river he met the defendant, Ed. Green, Churchill and the negro. Witness went straight home, and there found Pat Byrne, who remained there all the evening. Witness stated that he never saw the dead body nor ever stated to M. Byrne that he had looked for it.

Ed. Gill, for the defense, testified that he and ten others

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engaged in a search for Churchill's body, and went to Byrne's house about midnight. Witness, accompanied by one of the others, went into the house and asked Byrne if he remembered seeing the party of men pass his house. Byrne said he did not, and then some one in the house spoke, and Byrne said that his wife said the men did pass there. Byrne said nothing to witness about hearing any screams. Witness knew Byrne's general reputation for truth, and said it was bad; but stated that Byrne had not lived in Liberty county for the past three years, and his reputation where he was then living was not known to witness. The witness said he was related to Ed. Green. He did not recollect that, after he and others were at the house of Byrne, the latter came to witness's house and told him that he, Byrne, had misunderstood the day to which witness's inquiry had reference the previous night.

Lacour, testifying for the defense, stated that the sun was about an hour high when defendant and his companions left Liberty on the day in question. They had been playing cards and drinking beer.

F. Holloman, for the defense, testified that he was one of the jury of inquest, and helped to bury the body. It was in such an awful condition that he could only see that it was the body of a white man, because the hair was straight. It did not look like a human being, and was decayed beyond witness's recognition. Possibly in daylight an acquaintance of the deceased might have recognized it. Witness probed the wound four or five inches, but was so scared that he took but little notice of the body.

John Green, for the defense, was asked if he knew the general reputation of Byrne for truth while he lived in Liberty county and at the time of the *habeas corpus* trial,—three years before the trial pending. The counsel for the State objected to the question, and the court sustained the

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objection; to which the defense reserved exceptions, which are explained and discussed in the opinion of this court. With the testimony of this witness the defense closed its evidence.

In rebuttal the State called M. Byrne, who, with reference to the testimony of the defendant's witness Rose, stated that the latter told him that Pat Lum and Ed. Green had been looking for the body at night. And with regard to Ed. Gill's testimony, the witness said that he understood the inquiry made at the house by Gill to have reference to the then preceding Saturday, instead of that day of the previous week. After Gill went away, witness's mistake was corrected by his daughter; and witness afterwards went and explained the mistake to Gill.

Pat Byrne, recalled by the State, stated that he was not at Rose's house on the day in question.

Mrs. M. Byrne, recalled, testified that in the evening of March 13, 1875, her son Pat returned home a little while after the defendant, with Ed. Green and the negro boy, passed the house on their way home. Pat told witness what he saw about the killing of Churchill, and witness forbade him to tell his father or any one else about it, and told Pat she would whip him if he told it. Witness was sick at the time, and did not want to be bothered about the court; and, besides, some of the people were down on her family. After the defendant escaped she thought she would not be bothered about the matter, and then she told her husband what Pat had told her.

The testimony has been greatly condensed, and for brevity no distinction has been made between the direct and cross-examination.

Willie & Cleveland, and *Davis & Sayles*, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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WINKLER, J. At the September term of the District Court of Liberty county, A. D. 1881, the appellant was tried and convicted of murder in the second degree, and sentenced to serve a term of fifteen years in the State penitentiary, on an indictment filed on September 23, 1880, which charges that this appellant and one Ed. Green did kill and murder one William Churchill, alleged to have been committed in Liberty on April 1, 1875. The testimony adduced at the trial was voluminous and largely circumstantial.

The main features of the evidence may be succinctly stated as follows: About March 13, 1875, the appellant, Ed. Green, William Churchill and a negro boy were seen passing the road leading from the neighborhood in which the parties named lived, on the west side of the Trinity river, to Liberty on the east side of the river. Lum, Green and the deceased were seen together in Liberty, during the day, by several persons who testified in the case at the trial. It was shown that these same parties, Lum, Green, Churchill and the negro boy, re-crossed the river later in the afternoon of the same day, and were seen by different persons along the road returning, until within a short distance of the locality where they resided, and afterwards the parties, except Churchill, the deceased, were seen pursuing their route in the same direction.

One witness testified to the following additional facts, which we quote from the statement of facts in the language of the witness: "I saw the same parties coming back from Liberty in the evening of the same day that they passed our house going towards the town of Liberty; when I saw them Mr. Churchill was bleeding on the face. I was in the woods about one mile from my father's house, in the direction of the town of Liberty, when I saw them coming back. I saw Pat Lum, the defendant, strike at Churchill; he was behind him when he struck at him. He reached over and struck at Churchill in the back; he

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seemed to have struck him a little below the shoulder-blade. I then saw them — Pat Lum and Ed. Green — dragging the body off in the woods on the right-hand side of the road as you go from the town of Liberty. The country where this was done is broken and commences declining from the road on the side where they dragged the body, and continued till you get in the bottom. They dragged the body off in the woods, from out of my sight from the side of the road where I saw the defendant strike at Churchill. The body was afterwards found in the same direction where I saw them dragging it, about one mile from my father's house, in the direction of Liberty and on the right-hand side of the road going from Liberty."

This seems to have been the last witness who saw all the parties together. This witness on cross-examination said that when he first saw the parties on their return from Liberty, "going up the road the negro was in front, Ed. Green next, Churchill and Pat Lum behind; then they passed out of sight behind some underbrush and a turn in the road; the noise of loud talking as if quarreling going on. I passed to the west side of the road while they were hid from my sight. They then got into an open place when I saw them again, and Lum then struck the blow. The noise they made first attracted my attention; they spoke as though they were quarreling."

Further along and being still on cross-examination, this witness testified that "The body was found thirteen days after I saw this; which made it on the 26th of March when the body was found. All this occurred about one mile from my father's house; after seeing this I went straight home; my father, mother and sister were there; when I returned daylight had nearly gone. After I heard the loud talking, before I saw Lum strike at William Churchill, was not long, and the quarreling continued up to the striking. Lum was on the left-hand side of

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Churchill when he struck at him, about one half horse-length behind Churchill. My father and John Stiles found the body. It was about ten or twelve days after I saw the occurrence before they began to look for the body."

The next witness was the father of the first witness. This witness, after testifying to the fact of seeing the same persons pass his house going toward Liberty, stated: "On the evening of the same day, they passed back without Churchill. Before they came by, we heard some screaming in the direction of Liberty. It was in the afternoon when they passed back; I cannot place the time very well. Ed. Green was leading the horse that Churchill was riding in the morning. The horse had a saddle on him. The negro was ahead, and he waited at the creek until they—the other two, Pat Lum and Ed. Green—came up. I saw the dead body of Churchill about thirteen days afterwards, on Good Friday, the birthday of one of my daughters. Ed. Gill came one night and told me that somebody had murdered William Churchill, and the Roses told me that they had seen Pat Lum, Ed. Green and a negro boy looking about the place where the body was found, with a lantern. John Stiles and myself found the body about the same place where the shrieks came from, about one hundred paces from the public road, on the north side of the road. John Stiles first found the body; he was lying on his left side. Behind his left shoulder-blade there was a cut about four inches deep; there seemed to be a cut of a knife on his face near his mouth, and the mark of a blow on his head. The body was very much swollen, but I could see it was the same man who had passed my house that morning with the defendant, Ed. Green, and the negro boy, on their way to town."

John Stiles, who seems to have been the first person who discovered the dead body, among other things, said,

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in giving his testimony with regard to the identity of the body, as follows: "Any person who knew the man well before he was killed might have identified him. He had dark hair. Mr. Byrne told me he heard some one scream down that way, and insisted on going to look for him in that direction. Mr. Byrne remained with the body, and I went for a justice of the peace. I got back about eight or nine o'clock, probably later, that night. I had never seen Churchill before that time. I saw him dead; never have seen him since. He was a stranger in this country, and had not been here long."

We quote from another witness who seems to have seen the parties on their return from Liberty in the afternoon. He says: "I met them about half-way between Rogers's place and the ferry. We all took a drink. Churchill rode by, and it appeared that there had been some difficulty between Churchill and the ferryman; something was said and Churchill gave it "the damn lie." Pat Lum, the defendant, said, "do you call me a damn lie, sir?" We took another drink. After they went ahead I saw defendant whipping Churchill with a switch. Churchill stood and took it without saying anything, and without offering any resistance. They all got down at Mr. Rogers's and got some water, except Churchill. I got him the water and he said to me, 'Mister, this is mighty bad, but I reckon it will be all right.' That was after Lum had whipped him. I saw Pat Lum and Ed. Green one week from that day. I rode up to Mr. Ben Green's, and Ed. Green and Pat Lum came out. I said to them, 'Boys, they will give you fellows hell about that fellow.' They said they had not seen the man Churchill since he fell off his horse at the Black Hill. The Black Hill, as I understood it, is about two miles from Mr. Byrne's place, towards the town of Liberty. When they left Mr. Rogers's place, they went in the direction where the body was afterwards found, up the road. I have

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never seen the man Churchill since ~~that~~ day, that I know of." We have not attempted to set out the entire testimony of these witnesses either on their direct or cross-examination, nor to extract from any other witness's testimony, many of whom testified in the case.

The foregoing extracts will serve to indicate the general character of the case as developed upon the trial. We do not deem it important to consider in this opinion all the several grounds presented in the assignment of errors. The controlling questions presented in the brief of counsel for the appellant, seem to us to be: First, the sufficiency of the evidence to support the verdict and judgment, mainly as to the sufficiency of the testimony as to the identity of the body of the deceased. Secondly, alleged error in the ruling of the court upon the testimony offered by the defendant for the purpose of impeaching the testimony of certain of the State's witnesses; and thirdly, supposed error in the failure of the court to submit to the jury the issue of manslaughter.

I. Whilst it is true that "No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the killing" (Penal Code, art. 549), still we are of opinion that in this case, if the witnesses for the State are worthy of belief, the body found some thirteen days after the killing is the body of the missing man William Churchill, and that he is the same man charged to have been murdered. The proof of the witnesses shows, we think satisfactorily, that the body found was that of the identical person who was seen going to and returning from the town of Liberty, in company with the appellant, Ed. Green and the negro boy, and the man the appellant was seen whipping with a switch on the return from Liberty, and who was last seen alive by the witness who heard the wrangling and saw the striking at the deceased by the appellant. The place where the lick would

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have struck deceased corresponded with the wound which appeared on the body when found, and the body was found in the direction of the place where screaming had been heard on the same afternoon. The three other persons who were together and with the deceased in the morning were seen returning without the deceased, and having charge of the horse he was riding in the forenoon. And still further, the body was found in the same direction one witness had seen the appellant and Ed. Green dragging the body of Churchill down the hill. The testimony of Mr. Byrne alone was sufficient to not only identify the body as being that of Churchill, but his and other testimony showed that he had come to a violent death and at the hands of the appellant, or that of the appellant and Green acting in concert.

II. It is shown by one of defendant's bills of exception that the defendant offered evidence to discredit Mr. Byrne. The State's proof (the bill recites) shows, if it shows any offense, that it was committed in March, 1875. The defendant, Pat Lum, was a short time afterwards before the examining court. The witness Byrne was a witness before the examining court, and subsequently a witness on the hearing of a *habeas corpus* sued out by Pat Lum in the same case. The witness Byrne had been living in the neighborhood where the offense was alleged to have been committed for about five years before the time at which said offense was alleged to have been committed, and was living there when he testified in the examining court and on the hearing of the *habeas corpus*, and for some time after. But the witness for the past two or three years had been living in Beaumont. The defendant asked the witnesses Ed. Gill and John Green, as follows: "Do you know the general character of the witness Mr. Byrne for truth and veracity among his neighbors at the time he lived in this county, and at the time he testified before an examining court in this case, and on the hear-

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ing of a *habeas corpus* sued out by defendant in this case?" The State's counsel objected to the question and the court sustained the objection; and the defendant took a bill of exceptions to the ruling.

Abstractly considered, we are of opinion the question was a proper preliminary question to ask a witness who is offered for the purpose of impeaching a witness on the opposite side of the case. The rule cited by the counsel for the State, to the effect that, "When a witness has a fixed domicile, the impeachment of his character must relate to the time of the trial and the place of his domicile," is not applicable to or decisive of the question here presented. Generally, when a witness is offered for the purpose of impeaching another, he must show his competency to testify as to the general character of the witness sought to be impeached, among his neighbors. It is not what the opinion of the witness may be which qualifies him to testify as an impeaching witness; he must be able to testify to the general character of the witness sought to be impeached among his neighbors,—his general character, or the general reputation he has established among those among whom he has lived, or with whom he has most associated. The presiding judge, in giving his reasons for the ruling complained of, says: "The question involved in this ruling was simply this,—the witnesses were asked if they knew the reputation of Byrne for truth and veracity when he lived in this county three years ago, and when he testified some years ago before the examining court in this case. It was objected to by the State's attorney on the ground that they should only testify to the reputation of Byrne for truth and veracity in the neighborhood he now resides in, and testify to his present character for truth and veracity, and the court sustained the objection, stating that the witness could testify whether he knew Byrne's character at this time,—the time he was giving his testimony. The evi-

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dence of the examining court was not introduced upon the trial. The witness Gill did state to the jury that Byrne's reputation for truth was not good when he lived in this county in 1875, but that he was not acquainted with it now, and did not know how it stood and could not testify as to what his character at this time was for truth and veracity."

In general the authorities all agree that it is a requisite of law that, in order that an impeaching witness may be competent to impeach another witness, he must know what his general character is among his neighbors for truth and veracity. This question was a proper one. The ruling of the court was prejudicial to the rights of the defendant under the law. (See in point, *Kelly v. State*, 61 Ala. 19, and *Sleeper v. Van Middlesworth*, 4 Denio, 431.) When a certain state of things is once proved to exist, the law presumes its continuance until a change is shown. Therefore, when a witness, called to impeach the character of another witness, offers to speak as to the general character of the witness attacked, as it existed some two or three years before the trial, it is not too remote and its rejection is error. *State v. Lanier*, 79 North Carolina, 622, and authorities there cited.

III. Did the court err in omitting to charge on manslaughter? From a careful examination of the testimony, we fail to discover any proof which presents an issue of that character, or shows any probable cause, to reduce a voluntary homicide from murder to manslaughter, or which would excuse, or justify the act of killing. It is the duty of a trial judge to measure his charge by the evidence adduced, and to give instructions to the jury as to every legitimate deduction to be drawn from the evidence; but when he has done this, the law's demands are satisfied. The testimony did not call for an instruction on manslaughter as that grade of culpable homicide is defined by law.

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There were objections raised to the competency of two of the jurors summoned for the trial, as shown by bill of exception. It is shown that the defendant avoided these jurors by peremptory challenges, and that they did not serve as jurors on the trial. It further appears that the defendant did not exhaust his peremptory challenges. In such a case, even if there had been any erroneous ruling, it could not be cause for reversing the judgment by this court, as has been repeatedly decided.

The charge of the court is deemed to be substantially correct, under the proofs. There were no exceptions taken thereto, at the time of its delivery, nor were any additional charges asked on either side.

The indictment, notwithstanding the objection raised thereto in the overruled motion in arrest of judgment, is amply sufficient so far as this appellant is concerned, and he alone was tried under it.

After a patient consideration of the case, our conclusions are that the judgment must be reversed on the ruling on the evidence.

Reversed and remanded.

H. L. DREYER v. THE STATE.

1. **THEFT—OWNERSHIP.**—Indictment for theft of cattle alleged the ownership to be in one B. The proof showed that the cattle belonged to the estate of the deceased father of B., but that B. had the charge and control of them. *Held*, under article 426 of the Code of Procedure, that the ownership was well alleged in B., and that the proof was germane to the allegation.
2. **POSSESSION OF RECENTLY STOLEN PROPERTY—CHARGE OF THE COURT.**—When the chief inculpatory fact in a trial for theft was possession of the stolen property recently after the theft, it was error to refuse a requested instruction to the effect that such possession was not of itself sufficient to warrant a conviction.
3. **VENUE OF OFFENSE.**—Unless the record on appeal shows that there was proof of the venue of the offense, the conviction will be set aside.

Argument for the appellant.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. RUSSELL.

The indictment charged that, on or about January 1, 1881, in the county of Nueces and State of Texas, the appellant did "unlawfully and fraudulently take and steal from and out of the possession of one Mateo Baladez, of the property of the said Mateo Baladez, five certain head of neat cattle, without the consent of the said owner of the said property, and with the intent to deprive the said owner of the value of the said property, and to appropriate it then and there to the use and benefit of him the said person then and there so as aforesaid taking the same; contrary," etc. The jury found appellant guilty, and assessed his punishment at a term of two years in the penitentiary.

Such matters of fact as are immediately relevant to the rulings are disclosed in the opinion. There had been no administration on the estate of Jose Maria Baladez, the father of Mateo, in whom the ownership was alleged. Appellant was a butcher in Corpus Christi, and the merchants in whose warehouse the hides were found usually bought the hides of the animals he slaughtered. He claimed to have bought from one Tomayo the five head of cattle from which the hides were taken, and he produced some evidence in support of the claim. Several interesting questions besides those passed upon by this court are discussed with much force and ability in the printed argument of the appellant's counsel.

McC Campbell & Givens, and *Welch & Givens*, for the appellant. At the death of Jose Maria Baladez, the exclusive management, control and disposition of the community property passed to his surviving wife, subject to the payment of debts and a distribution of their several moieties to the heirs, as they became of age. Mateo Baladez

Argument for the appellant.

at no time had legal possession of any cattle of Jose Maria Baladez, deceased; and since the ownership and possession was, in the indictment, laid in him, only proof consistent with that allegation should have been admitted. It was doubtless the presumption of the trial court (as shown by his ruling on this question) that article 426, Code Crim. Proc., sustained said ruling. We think it exceedingly doubtful whether said article authorized the position thus taken by the trial judge, that the ownership and possession was properly laid in Mateo Baladez.

The statute provides that the exclusive management, control and disposition of the community property of Jose Maria Baladez, deceased, was in his wife, subject to debts.

Then this property under the law did not belong to the estate of Jose Maria Baladez. One-half of it belonged to the surviving wife and the other half to the children of the marriage, seven in number, none of whom is shown to have been of lawful age so as to entitle them to any portion of the common property. Nothing was before the court to show that, after the debts were paid, anything would be left. It is true that Mateo Baladez testifies that he had charge of the stock, but he admits they were in his mother's possession and that she had the right to sell them. But we think this falls far short of the possession, charge or control requisite under said art. 426, Code Crim. Proc. True, a minor son whose services belong to his parents, working stock on a stock ranche, has a certain kind of charge and control, but no actual charge or control exclusive from the parent. It is only such as a day laborer would have. The ownership, possession, charge, control and management still remain in the mother, where the law places it, and the charge and control of Mateo Baladez was not such as would authorize or draw ownership with it.

Again, the property not belonging to the estate of Jose Maria Baladez, the ownership could not properly be alleged in one of the minor heirs, whose interest was con-

Argument for the appellant.

tingent. The property was not owned in common until the debts were discharged, if any.

Again, we contend that under the law the surviving wife is, after the death of her husband, the head of the family and takes his place as regards the community property and the minor children. She is to care for, educate, clothe and maintain them; to pay the debts, and manage and control the property. It is only when the minor becomes of age, if there is any property remaining of the community, that he acquires an interest. It must be conceded that the interest of minors in their father's estate, during his lifetime, is only a contingent one; and if upon his death the surviving wife has the same exclusive management, control and disposition of the property, what is the interest of the minors, but still a contingent one? The provision of requiring the survivor to give bond, is only a protection, not the vesting of an estate either real or personal, and the survivor can sell and dispose of all the personal property; and hence the minors cannot be said to have an interest therein, nor is it in the nature of property in common with survivor and minors. We think this question of allegation regarding ownership of community property is settled in the case of *Wilson v. State*, 3 Texas Ct. App. 206.

We submit as the first proposition under the fifteenth assignment, that in a trial for a felonious theft, where the only inculpatory fact against an accused is possession of the property recently stolen, the jury should be instructed that it is a circumstance proper for their consideration in determining the guilt or innocence of the accused, but does not of itself constitute sufficient evidence to warrant a conviction.

The above charge in writing was asked by defense to be given by the court. It was refused, and defendant excepted to the refusal. *Hernandez v. State*, 9 Texas Ct. App. 288, and cases there cited.

The evidence does not disclose when, where or by whom

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the cattle alleged to have been stolen, were taken, if ever taken. Hides were found and claimed to be those of the stolen cattle, and traced to defendant's possession. Suppose Doddridge & Davis could not have recollected from whom they received the hides, would their possession, unaccounted for, have been theft? The rule as announced in the case of *Hernandez v. State*, by the Court of Appeals, is imperative; yet in this case it was ignored by the trial judge; with the gravest consequences to the accused.

In a prosecution for theft, a verdict of the jury finding defendant guilty as charged in the indictment is a finding for theft; and cannot be sustained in the absence of evidence as to theft or any unlawful taking. Nor can the verdict be sustained by evidence sufficient to show the offense of receiving stolen property knowing it to be stolen. *McCampbell v. State*, 9 Texas Ct. App. 124; *Chapman v. State*, 1 Texas Ct. App. 728; *Martin v. State*, 44 Texas, 172; *Tollett v. State*, 44 Texas, 95; *Barnes v. State*, 43 Texas, 98.

The indictment herein against appellant was for theft of cattle; the verdict of the jury, "guilty as charged in the indictment." We submit, in all candor, that the evidence of the prosecution considered in the strongest light against the accused fails to show even a probable case of theft by him. The place the cattle were stolen from was 42 miles from Corpus Christi, and no evidence was produced or could have been produced that appellant or his employees ever left Corpus Christi or were seen outside its limits. No attempt is made by the prosecution to show a taking by appellant or any other person, of the cattle claimed to have been stolen.

H. Chilton, Assistant Attorney General, for the State.

WINKLER, J. The appellant was indicted for the theft of five certain head of neat cattle, alleged to be the prop-

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erty of one Baladez, in the county of Nueces. The indictment is in substantial compliance with what is termed the common-sense indictment act of March 26, 1881, and is deemed sufficient, not only because it is in compliance with the statutes but because the form contains all the essential requisites of an indictment for theft.

Agreeably to the principal State's witness, he was in charge of and lived at the Calaveras Rancho, Nueces county, and the cattle described in the indictment belonged to Jose Maria Baladez, deceased, and the witness has control of the Jose Maria Baladez cattle. He says: "I have control of Jose Maria Baladez's cattle. I am his son. I have control of the cattle, though they are in my mother's possession. I am head man that has control of the rancho."

The law is that where one person owns property, and another person has the possession, charge or control of the same, the ownership may be alleged to be in either. When property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator, or heirs of such deceased person, or in any one of such heirs. Code Crim. Proc. art. 426. The possession of the son of the deceased father, or the fact that the person alleged to be the owner had control or management of the cattle alleged to have been stolen, would be such allegation of ownership, although the deceased father's estate or the mother of the witness held the title.

It was in proof that when the cattle were missing from the rancho in question, and search was made without finding them, the principal witness for the State went to Corpus Christi in search of them, and there found five hides in a warehouse belonging to Doddridge & Davis, and the hides were shown to have been purchased from the defendant. The principal inculpatory fact against the defendant was this find of the hides.

Under this state of the evidence counsel for the defend-

Syllabus.

ant requested the court to charge the jury that "the possession of property recently stolen is a circumstance proper for the consideration of the jury in determining the guilt or innocence of the accused, but did not of itself constitute sufficient evidence to sustain a verdict of guilty." We are of opinion that the charge announces a correct principle of law, and was applicable to the facts proved on the trial, and that the court erred in refusing to give it in substance to the jury. The proof fails to establish that the cattle were stolen in Nueces county, and this feature of the case would require a reversal of the judgment. Other errors are complained of, which are either deemed not sufficient to cause a reversal of the judgment, or will be easy of correction in another trial.

Because the venue has not been sufficiently proven, and because the court erred in refusing the charge set out above, the judgment will be reversed and the case remanded for a new trial.

Reversed and remanded.

11	509
28	600
11	509
30	557
33	233
11	509
34	288

CHARLEY REED v. THE STATE.

1. **SEVERANCE.**—The Code of Procedure, article 649, provides that a severance may be had by any one of several defendants jointly prosecuted; and, if the severance is sought for the purpose of obtaining a co-defendant's evidence, it is required that the applicant file his affidavit stating that fact and that the evidence of his co-defendant is material to his defense, and further alleging that there is no evidence against the co-defendant. Literal adherence to the language of the Code is not necessary in the affidavit, and it is sufficient if it substantially complies with the requirements prescribed. In the present case the applicant swore that he "verily believed" there was no evidence against the co-defendant, and this is *held* sufficient.
2. **SAME.**—But the allegation that there is no evidence against the co-defendant may, it seems, be controverted by the State; and a previous trial and conviction of the co-defendant would be suffi-

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cient, *prima facie*, to rebut the allegation, and to authorize the trial court to disregard the affidavit, unless the conviction had been reversed on appeal because of the want of evidence against the party.

3. SELF-DEFENSE.—In a trial for murder the court charged the jury that an adulterer, caught in the act of adultery, has no right to resist an attack made upon him by the husband. *Held*, that the instruction is erroneous because it deprives the slayer absolutely and entirely of all right of self-defense, regardless of the legal principles which, while according that right plenary to him only who acts from necessity and is himself without fault, do not wholly deny it to him who, when caught in the perpetration of a misdemeanor and assaulted by the person aggrieved thereby, kills the latter to save his own life. Adultery is only a misdemeanor in this State, and therefore the instruction given to the jury transcends the law. See the opinion *in extenso* on the distinction between the perfect and imperfect right of self-defense.
4. SAME.—The amenability of a person charged with crime is conditioned solely on his own acts, and is never dependent upon the immunity of the injured person in case the result had been different. Therefore, though the Penal Code justifies the husband in slaying a person when taken in the act of adultery with the wife, it does not follow that the adulterer is guilty of murder if, being attacked by the husband, he kills him to save his own life. Under such circumstances manslaughter would be the maximum of culpability.

APPEAL from the District Court of Cooke. Tried below before H. E. ELDRIDGE, Esq., Special Judge.

The indictment in this case was filed August 7, 1880, and charged that the appellant and Amanda White, on March 17, 1880, of their express malice aforethought killed and murdered Frank White by shooting him with a pistol. The trial of appellant resulting in this appeal was had in September, 1881, and resulted in his conviction for murder in the second degree, and the assessment of his punishment at a term of nine years in the penitentiary. On application of the district attorney a severance of the defendants was ordered by the court, and appellant was first put upon trial. He had previously applied for a severance for the purpose of having Amanda

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White first tried, with the view of using her as a witness in case she should be acquitted. The character and disposition of his application are disclosed in the opinion of this court.

Defendant and the deceased were colored people, as were also most of the witnesses. The deceased and his wife Amanda had separated, and for some weeks prior to the homicide she had been living in a room which she rented in the town of Gainesville. Defendant boarded with her and lodged in her room, of which he was the only inmate besides herself. About midnight of the 17th of March, 1880, a crashing noise, followed immediately by two or three reports of fire-arms, was heard to proceed from the room occupied by Amanda and the defendant. The neighbors hurried to the scene and found the door broken down from the outside, Frank White dead upon the floor, and Amanda apparently in great distress. The defendant was not in the house, but the first witness who reached there saw him running off.

In volume 10 of these Reports, at page 381, will be found the case of Amanda White on appeal from a conviction for murder in the second degree, had upon the same indictment brought up in the present record. The report of that case gives in detail the testimony of the numerous witnesses who testified at the trial of Amanda in the court below. Not all of those witnesses were examined at the trial of the present appellant, but the testimony of those who were was substantially the same as that which they gave in the case referred to, and consequently need not be reproduced in the present case. At the appellant's trial, however, a few witnesses testified who were not examined when Amanda White's case was tried, and among them was Ann Brockman, probably the wife or widow of Dick Brockman, who testified for the State against Amanda White, but was not produced at the trial from which this appeal results.

Statement of the case.

Testifying for the State, Ann Brockman said that she knew Frank White, the deceased. When he was killed his wife, Amanda, lived in a room which adjoined the one occupied by witness, and had lived there for three or four weeks before her husband's death. About a week after Amanda moved there the defendant began staying in the same room with her. It looked like they were living as man and wife; no one else stayed there but them. About nine o'clock in the night Frank White was killed, the defendant came to the room of witness and said he was going to take his things and leave Amanda's room,— that he did not want to hurt Frank and did not want Frank to hurt him. He said he had lay in jail six months for a smaller woman than Amanda. When the defendant came to witness's, Amanda was not at home, and as soon as she came home he went to her room. Witness heard him tell Amanda in substance what he had previously said to witness,— that he did not want to hurt Frank nor Frank to hurt him, and that he was going to take his things and leave; to which Amanda replied, "You don't suppose I am going to let Frank come here and kick your things out after I have taken you in?" Amanda then went and bolted her door, and the defendant said to her, "Don't be shoving them bolts behind me,— I am going to take my things and go." Witness went to bed and to sleep, and heard nothing more said by Amanda and defendant. The shooting awakened witness, and she heard people come to the house, but did not go into Amanda's room.

On cross-examination the witness said that the partition between her room and Amanda's did not reach the ceiling. She awoke in time to see the flash of the last shots that were fired. In her room and Amanda's it was perfectly dark except the flash of the pistol. It was a dark, cloudy and moonless night. Some one who came to the house lit witness's lamp and took it into Amanda's

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room. That was the first light there of any kind after the shooting, and several persons had got there then. Witness has no clock, and it may have been later than nine o'clock when the defendant came to her room.

Rhoda Davidson, who was a State's witness against Amanda White, was introduced and examined by the defense in the present case. She stated that on the night Frank White was killed the defendant came to Mr. Fletcher's, where witness was living, and asked witness if Amanda was there. Deceased and Amanda were then in witness's room, talking. Defendant threw upon a chair the key to Amanda's house, and told witness to tell Amanda he would not see her again that night. When the deceased and Amanda came out of the room, witness gave the key to the latter and told her what the defendant had said. When Amanda left she asked witness to go with her and stay all night. She had secured a room of Fletcher, where witness lived, and had arranged to move into it the next morning. She and her husband, the deceased, were going to live together again; witness heard her tell him she would try him again if he would give her things back to her.

Charles Bruce, for the defense, testified that he owned the house in which Amanda White was living when her husband was killed. About a week or more after she moved into the house, the defendant began boarding with her. One day before Frank White was killed, the witness went to collect his rent from Amanda, and she did not have the money. The defendant was there, and she asked him if he could pay his board. There was a narrow bed in the room, and also a pallet on which the defendant slept. For a week or two after Amanda rented the room a girl stayed there with her. The room was a very small one, and Amanda and defendant were its only occupants when deceased was killed. Witness reckoned that the defendant was a select boarder.

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Wiley Wilson, for the defense, stated that he and his wife were at Amanda's the evening preceding the killing, and stayed there until about half past ten o'clock. The door of Amanda's room was not broken at that time. Defendant boarded there and slept there on a pallet; witness had been there often when the pallet was made down for the defendant.

Mary Wilson, for the defense, stated that she was Amanda's sister, and was at Amanda's the evening the defendant applied to the latter for board. Amanda told him she would charge him two dollars and a half per week; for which he was to have board and lodging, and she was to do his washing and ironing. Witness had seen the defendant pay money to Amanda.

The other testimony is comprised in the case of *Amanda White*, 10 Texas Ct. App. 381.

R. Sarlls, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant and Amanda White were jointly indicted for the alleged murder. Appellant filed his affidavit and asked a severance in the following terms, viz.: "Personally appeared before me Chas. Reed, one of the defendants, who, after being duly sworn, says that he verily believes that there is no evidence against Amanda White, who is jointly indicted with him, and that her evidence is material for his defense; therefore he asks the court to grant him a severance and try Amanda White first; which severance is asked for the purpose of procuring her evidence in his defense." In his explanation to the bill of exceptions the judge presiding states that the court refused and overruled the application, "which the court declares insufficient to entitle defendant to have his co-defendant, Amanda White, tried first." No other

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ground is assigned for the action of the court, and therefore we will take it for granted that there was no other.

If the statute is referred to we think it must be apparent that the ruling was erroneous inasmuch as the affidavit quoted is in substantial if not literal compliance with its provisions; which are, "Where two or more defendants are jointly prosecuted they may sever in the trial at the request of either; and if the defendant upon whose application the severance is allowed shall file his affidavit in writing, stating that a severance is requested for the purpose of obtaining the evidence of one or more of the persons jointly indicted with him; that such evidence is material for his defense, and that there is no evidence against the person or persons whose evidence is desired, such person or persons shall be first tried." Code Crim. Proc. art. 669.

But whilst an affidavit of this character might be sufficient whether in exact or substantial compliance with the statute, still we imagine the severance would not be a matter of right; but the facts stated might and could be controverted by a showing on the part of the State that it was not true that there was no evidence against the co-defendant whose evidence was desired; and a trial and conviction of such defendant upon said charge would be sufficient *prima facie* to rebut the affidavit and authorize the court to disregard and overrule it, even though such conviction may have been reversed on appeal to the court of last resort, unless such reversal was on account of the want of sufficient evidence to support the verdict and judgment. No such ground is assigned for overruling the application, and inasmuch as the ruling was predicated solely upon its supposed insufficiency under the statute, the ruling was manifestly erroneous.

We propose next to notice what in our opinion constitutes the only remaining error shown by the record. In the 13th paragraph of the court's charge to the jury they

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were instructed that "When the husband takes a party actually engaged in the act of adultery with his wife, and he then and there attacks the adulterer, *the adulterer is not justified in resisting such attack*; but when the husband has knowledge that his wife is thus living in adultery with another, and connives at and acquiesces in the adulterous connection, he would have no right to kill or inflict serious bodily injury on the adulterer. If you believe from the evidence that defendant Charley Reed and Amanda White were living in adultery at the time of the killing, and that Amanda White was at that time the wife of deceased, and that defendant and Amanda White were then and there, at the time of the killing, taken in the actual act of adultery by Frank White, before defendant and Amanda White had separated, and that Frank White then and there made an attack on defendant, *defendant had no right to resist such attack, and an attack made upon defendant under such circumstances does not come within the definition of self-defense.*" We have italicised the objectionable portions of this charge.

Evidently the court must have based this charge upon the converse of the proposition stated in article 567 of the Penal Code, which declares that "homicide is justifiable when committed by the husband upon the person of anyone taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated." In other words, the controlling idea intended to be conveyed by the court, according to our construction of the language used, seems to have been that, because the law would justify the husband in taking the life of the adulterer under the circumstances named in the statute, it would follow that the adulterer must submit to the infliction of death thus attempted to be executed upon him, and that he was not even authorized to *resist* an attack upon his life by the injured hus-

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band, much less plead such deadly attack by way of justification or self-defense if in resisting such attack he was compelled to take the life of the injured husband to save his own.

Thus it appears that the court has attempted to make the legal *status* of the defendant depend upon what might or would have been the law with reference to the act of deceased, had the situation of the parties been reversed and the latter had taken the life of the former. In no possible state of case would such a rule of deduction be a fair or conclusive criterion in the administration of criminal law. The accused is always guilty or innocent from his own stand-point, that is, his personal, individual acts with relation to the matter charged.

Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says: "Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay, even for homicide, but care must be taken that resistance does not exceed the bounds of mere defense and prevention; for then the defender would become the aggressor." 2 Cooley's Black., Book III, chap. 1, p. 44.

But the right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law, regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation wherein it be-

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came necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned.

Mr. Bishop says: "The rule is commonly stated in the American cases thus,—if the individual assaulted, *being himself without fault*, reasonably apprehends death or serious bodily harm to himself unless he kills the assailant, the killing is justifiable." 1 Bish. Cr. L. § 865. But a person cannot avail himself of a necessity which he has knowingly and wilfully brought upon himself. *State v. Neely*, 20 Iowa, 108; *Adamas v. People*, 47 Ill. 376; *State v. Starr*, 30 Mo. 270. That is, it will not afford him a *justification* in law. See 2 Cooley's Black., Book IV, chap. 14, p. 180. How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay

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his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law.

If we apply this view of the law to the supposed case stated by the court in the charge to the jury, which we have quoted above, then the charge is manifestly erroneous. It is erroneous in that it deprives the defendant absolutely of his right of resistance and self-defense. If defendant was taken by deceased in the act of adultery with his wife, and to avenge the wrong deceased made a dangerous or murderous assault upon him, in resisting which he took the life of deceased, under such state of facts defendant would be guilty of manslaughter, because he was committing a misdemeanor which was the cause of and brought about the necessity for the homicide. Adultery, under our statute, is only a misdemeanor, and punishable by fine of not less than one hundred nor more than one thousand dollars. Penal Code, arts. 333-336. Carried to its legitimate extent, the charge of the court would make adultery a felony, punishable with summary death, because it would require the defendant to submit to death without an attempt even to defend or preserve his life.

For error in the charge of the court as above discussed, the judgment is reversed and the cause remanded.

Reversed and remanded.

Statement of the case.

J. M. MCGEE AND OTHERS *v.* THE STATE.

1. BAIL-BOND.— When the offense of which the principal obligor is accused is named in the bail-bond, and it appears therefrom that he is accused of an offense against the laws of this State, it is not necessary that the bond shall disclose the mode of the accusation,— *i. e.*, whether it is by indictment, information, or otherwise.
2. SAME— THEFT FROM A HOUSE.— Article 764 of the original Penal Code made theft from a house a felony irrespective of the value of the property taken, and as its penalty prescribed a penitentiary term of which the maximum was less than that prescribed for ordinary theft of property worth twenty dollars or more; but the repeal of that article in 1876 had no other effect than to subject theft from a house to the same punishment as that prescribed for ordinary theft. Since the repeal of said article, therefore, as well as prior thereto, a bail-bond designating theft from a house as the accusation against the principal offender conforms to the requirement that such a bond shall name an offense against the laws of this State.
3. FORFEITURE.— If the court before which the principal obligor is bound to appear has no authority to require him to answer the charge against him, it has no power to adjudge a forfeiture of his bail-bond. See the opinion *in extenso* on this subject.
4. CASE OVERRULED.— *Wilson v. State*, 25 Texas, 169, overruled in so far as it sustains the validity of a bail-bond which misstates the offense charged against the principal obligor.

APPEAL from the District Court of McLennan. Tried below before the Hon. L. C. ALEXANDER.

The bail-bond is in the following language: “Know all men that we, Ed. Foster as principal, and J. M. McGhee, H. A. McGhee, and H. W. McGhee as sureties, acknowledge ourselves bound unto the State of Texas, the said principal in the sum of two hundred dollars, and the sureties in the sum of sixty-six 66-100 dollars each.

“The condition of the obligation is such that if the said Ed. Foster, principal, will make his personal appearance before the Honorable District Court for McLennan county, Texas, at the court-house thereof in the town of Waco, on the first Monday in May, A. D. 1876, and there

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remain from day to day and term to term until discharged by due course of law, then and there to answer the State of Texas upon a charge by —— for theft from a house, an offense against the penal laws of the State of Texas, this obligation to be null and void; otherwise to remain in full force and effect.”

The forfeiture and judgment *nisi* were entered up in December, 1877, and at the Fall term, 1880, the sureties appeared and moved to quash the bond for reasons disclosed in the opinion of this court.

This cause was decided at the Tyler term, 1881, of the Court of Appeals, but failed to reach the Reporters with the other cases of that term.

Clark & Dyer, for the appellants.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. One Ed. Foster being indicted for theft from a house on the 28th day of April, 1876, entered into bond with appellants as his sureties. Foster failing to appear and answer to the said indictment, his bond was, on the 21st day of December, 1877, declared forfeited, and judgment *nisi* entered thereon.

The parties, being cited, came on the 5th of November, 1880, and moved the court to quash the bond of their principal, and vacate all proceedings had thereunder, for the following reasons: 1. Because said bond is not payable to the State of Texas. 2. Because it does not appear from said bond that Ed. Foster is accused by indictment, information, or otherwise of any offense. 3. Because theft from a house is no offense known to the law.

This motion was by the court overruled, and final judgment rendered against the parties (the appellant failing to answer further). The appellants excepted, and bring the cause to this court. Appellants urge the second and third grounds in the motion for a reversal, waiving the first,

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The objection to the bond contained in the second ground is, that it does not appear from said bond that Foster is accused by *indictment, information or otherwise* of any offense. This raises the question, is it under the wording of this bond necessary, in order to be sufficient, for it to appear how, in what manner, or by what authority, the principal is accused? The appellants insist that it is, and in support of the position cite *State v. Gordon*, 41 Texas, 510. We will quote from the opinion in that case all that we think bears upon the point: "The bail-bond required Thomas Gordon to answer the State of Texas on a charge against him by affidavit of Daniel Scurlock, setting forth the facts, of a theft of money. The bond neither gave the name of the offense with which he was charged as 'theft,' nor did it in any way show why such an affidavit made by Scurlock authorized the sheriff or any one else to take a bail-bond from Gordon, or that it was authorized by any court or tribunal having authority to require such bond. Nor does it appear therefrom that he had been legally accused of an offense, unless it had also been shown that some court had acted on it, for the arrest of Gordon, and he had been bound over to answer the charge therein contained. And all this would have been a very unnecessary circuitry of expression to show, as it should have done, that he was required to answer to the State of Texas on a charge of theft.

"The Code of Criminal Procedure on this subject provides that the bond shall require the defendant to appear before the proper court to 'answer the accusation against him;' and in order that the accusation may be shown to be *such* as to *authorize* the bond, it is further prescribed 'that the offense of which the defendant is accused be *distinctly named* in the bond, and that it appear therefrom that he is accused of some offense against the laws of the State.'"

From the above we learn that if the offense is not

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named in the bond, then it must appear how, in what manner, or by what authority the defendant is accused of an offense — whether by indictment, information, complaint or *mittimus* of an examining court. But if named, and it appears therefrom that he is accused of an offense, it would be unnecessary certainly to state the circumstances which authorize the bond. All that would be necessary would be to name the offense, and if the offense named appears to be one against the laws of the State, the bond, so far as this requisite is concerned, would be sufficient. It therefore follows that if this bond names an offense which is recognized as such by the law of the State, the above opinion sustains its sufficiency, and does not support the position of appellants.

This leads us to the third ground of objection to the bond, which is “that theft from a house is no offense known to the law.” If theft from a house is an offense against the law of this State, this objection is not well taken; if not, it is.

When the bond was executed, article 2408, Paschal’s Digest, had not been repealed. Before the forfeiture, however, it had. That article provided that if any person should steal from a house, he should be punished by confinement in the penitentiary not less than two nor more than seven years. It will be seen that this article does not pretend to define an offense; no element of the offense of theft is mentioned. Its sole object was to prescribe a punishment for an offense, defined elsewhere, when committed from a house. The repeal, therefore, of this article left the offense of theft, whether committed from a house or elsewhere, if in this State, still an offense against the laws of this State.

It will not be seriously contended that the repeal of this article will have the effect to permit thieves to enter the houses of the people of this State, and fraudulently take the property of the owners, and not be guilty of theft

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under the law of this State. Nor can it be affirmed that if a party were indicted in the courts of this State, and the indictment were to charge in the most explicit terms that the defendant fraudulently took the property from a house (the other ingredients being charged), the indictment would be insufficient because it contained the allegation "that the property was taken from a house." This indictment would be perfectly good, whether this allegation be treated as descriptive or surplusage. We therefore conclude that theft, though committed from a house, is still theft, and therefore an offense against the laws of this State. It is not only theft, but theft from a house; for if a person in truth and in fact should enter a house and steal therefrom, he would be guilty of theft, and the theft would be from a house. An indictment alleging the facts, entering ever so largely into the particularities, if it contained the ingredients of the offense, would certainly charge the offense.

Again, suppose the Code had never contained this article, who will contend that, because the indictment contained this allegation, it would from that fact fail to charge the offense of theft? We therefore conclude that, notwithstanding article 2408, Paschal's Digest, is repealed, theft whether from a house or not is an offense against the laws of this State.

What then, is the result—the effect—of the repeal of this article? To this we reply that, if the offense described in article 2381, Paschal's Digest, is committed from a house, the punishment annexed by article 2408 cannot be imposed, because the last named article stands repealed, thus leaving the act of theft committed from a house to be punished as ordinary thefts,—the punishment depending upon the amount of the property stolen.

Notwithstanding we are of the opinion that theft, whether committed from a house or elsewhere, is an offense, it does not follow therefrom that the forfeiture of

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the bond in this case was proper, and that the judgment *nisi* constituted a legal basis upon which to render the judgment final.

The principal must appear and answer. The court before whom he is required to appear must have the power to demand of him an answer to the charge against him. That charge was theft committed from a house, and being thus committed, was, by article 2408, made a felony and punished in a certain manner, without regard to the value of the property. And this article being in force at the commission of the offense, the defendant could not be subjected to the penalty then, that was imposed by this article. Article 2408 being repealed, the punishment thereunder could not be imposed. Nor could the punishment for ordinary theft be inflicted, for the reason that it is greater than that imposed by the repealed article, to wit, 2408,—the article in force when the crime was committed.

To restate it:—the penalty under article 2408 could not be enforced because repealed; the penalty for theft generally could not, because greater than that prescribed when the offense was committed. The correctness of the last proposition depends upon the property;—if twenty dollars or over, is it correct—the punishment being in ordinary theft from two to ten years? But, suppose the value to have been under twenty dollars, then the District Court had no jurisdiction of the cause;—could have taken no steps in it nor made any order therein. The District Court, if the value was under twenty dollars, could not have demanded of the principal an answer, and unless the court has power to put the party upon his answer, he is not required to appear before a court thus devoid of this power. The District Court having under no circumstances the legal right to demand of the principal an answer to the charge, no legal forfeiture could be taken on failure of the principal to appear and answer. It

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therefore results from these premises that the judgment final was without authority.

But it is urged with great force and plausibility, by the assistant attorney general, that if theft from a house is an offense, treating "from a house" as surplusage, the bond is sufficient; nor does it matter whether it be the offense of which the principal is accused or not. In support of this proposition the assistant attorney general relies on the case of *Wilson v. State*, 25 Texas, 169. The opinion in that case clearly sustains the position. This very question, however, came before the Supreme Court subsequently, in the case of *State v. Cox*, 25 Texas, 404, and in the case of *Foster v. State*, 27 Texas, 236. In this latter case Judge Moore explicitly asserts this proposition, to wit,—that, to be sufficient, the bond must distinctly name the offense of which the defendant is *accused*, and that it appear therefrom that he is accused of some offense against the laws of the State. In that case, the defendant Foster was indicted for an aggravated assault. The offense named in the bond was assault and battery. The bond was forfeited, *scire facias* issued, judgment final was rendered against defendant and his sureties; and the case was taken to the Supreme Court by error. In construing the statute upon this subject, Judge Moore, conclusively to our minds, gives the *reason* of the law. He states that "the object of the bond is that the parties to the bond may know the offense to which the defendant is required to appear and answer; not that they may be advised simply of the class of offense to which it belongs." The principle contended for by the assistant attorney general does not require so much as that the class of offenses be named,—that any offense will suffice.

The rule of law enunciated in Foster's case is evidently in conflict with that stated in *Wilson v. State*, 25 Texas, 169; and though the latter has never been expressly overruled, we think these subsequent cases have that effect.

Syllabus.

These cases being in conflict, we would look to the reason for each, and adopt that which better accords with the provisions of the Code. We think *Foster v. State* unquestionably meets and gives force and effect to every requirement of the Code, while Wilson's case does not. We therefore approve the opinion in Foster's case, and overrule that in Wilson's.

The District Court having no power to put the principal upon his answer in this case, a forfeiture of his bond was without authority; hence the final judgment was illegal, erroneous, and is reversed and the cause remanded.

Reversed and remanded.

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T. A. GARY AND ANOTHER v. THE STATE.

1. BAIL-BOND.—The condition of a bail-bond stipulated that the principal obligor should make his appearance before the proper court at its next ensuing term, and should there remain from day to day and from term to term until discharged, but omitted to stipulate that he should answer the accusation against him. *Held*, that the omission does not impair the validity of the bond.
2. SAME.—A surety signed a blank bail-bond and delivered it to his principal to be filled up with the penal sum of \$300. The principal, being required to give bail in \$1,000, presented the blank bond with the surety's signature, and the examining magistrate filled it with the sum of \$1,000, conditioned for the appearance of the principal. The principal failed to appear and the bond was forfeited, and the surety, in defense to the *scire facias*, alleged the facts and pleaded *non est factum* to the bond. *Held*, that the act of the surety in signing and delivering the blank bond, knowing its purpose, made him liable for the amount inserted in it by the examining magistrate, who accepted it in ignorance of any limit to the surety's authorization. See the opinion *in extenso* on the question.
3. SAME—SHERIFF'S RETURN.—The Code of Procedure, article 462, provides that if a party arrested under a *capias* for felony had previously given bail to answer said charge, his sureties shall be released by the arrest, and he shall be required to give new bail. *Held* that, in a *scire facias* proceeding upon the original bail-bond, it was con-

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petent for the State to controvert and disprove the sheriff's return on the *capias* to the effect that he had executed it by arresting the party. But it seems that a sheriff's return on a *capias* that he had "executed" it, without showing how, does not purport an actual arrest of the party.

4. NEW TRIAL.—SCIRE FACIAS proceedings on forfeited bail-bonds are not within the provision of the Code of Procedure which prohibits a new trial after verdict for the defendant.

APPEAL from the Criminal District Court of Galveston.
Tried below before the Hon. GUSTAVE COOK.

This cause was decided at the Galveston term, 1881, but the record failed to reach the Reporters with the other cases of that term, and the transcript was destroyed by the fire which occurred in the court-rooms at Galveston, in January, 1882, and has never been received. The opinion of this court, however, seems to disclose all facts relevant to the rulings.

F. Charles Hume, and Wheeler & Rhodes, for the appellants.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. James H. Baker was charged before the justice of the peace of precinct No. three, Galveston county, with the offense of libel, and on the 7th day of August, A. D. 1874, he entered into bond, with appellants as his sureties, for his appearance at the next term of the Criminal District Court. The amount of the bond was \$1,000. At the September term of said court the cause was reached and called for trial. The principal failing to appear, the bond was forfeited and judgment *nisi* was entered against him and against Gary and Bondies, his sureties. Upon this judgment *scire facias* issued. At the December term Bondies answered, insisting upon two grounds why the judgment *nisi* should not be made final.

The first ground urged in the answer is, "that he ob-

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ligated himself to answer for the appearance of Baker, the principal, at the *next term* of the Criminal District Court, and for no other term; and that his principal did appear at the next ensuing term," etc. The second ground relied upon in the answer is that the principal was arrested upon a *capias* issued upon an indictment for the same offense at the next term of the court, and that thereby the defendant was released from the bond, this re-arrest being a repudiation of the bond. The answer was filed on the 29th of December, 1874. On the 24th of May, 1875, the defendant Bondies, in an amended answer, alleged another reason why the judgment should not be made final, which is as follows: "That the bond upon which the judgment is sought to be made final was signed in blank by the principal and sureties, and afterwards filled up by the justice of the peace; that he never executed the said instrument, and that the same is not his act and deed."

The defendant Gary answered by special exceptions to the sufficiency of the bond, and then alleged several reasons why the judgment should not be made final, which will be found below. Defendant Bondies adopted these exceptions and all other matters pleaded by Gary.

The exceptions to the sufficiency of the bond are these: 1st. That the bond does not state that the defendant Baker is to appear and *answer* any accusation made against him for violation of any law. 2d. There is no offense known to the law, set forth in the bond or condition of the bond, that the said Baker is bound to *appear* and *answer* to. 3d. That the said bond is otherwise insufficient, illegal and void. Further answering, the defendant Gary charges, in substance, that the principal appeared at the next term of the court, and was by the sheriff arrested upon the same charge after indictment; that he did not execute the bond, nor did he authorize any other person to execute the same for him, nor was it done by his

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knowledge, or consent, and that the said bond as set forth is not his act and deed. Defendant Gary states that his genuine signature is attached to the bond, but that at the time he signed the same it was blank, and no amount was stated in said bond, nor were there any specific conditions set forth in said bond; and that at the time he signed the bond it was handed him by *J. H. Baker*, in blank, who stated that he, Baker, wanted to give a bond for three hundred dollars and wished this defendant to sign it; which defendant did on the statements and representations as aforesaid; and that all other written parts of said bond above the signature thereto were done and performed by parties unknown to this defendant, and without the knowledge, privity, or consent of the defendant; all which he is ready to verify.

The special exceptions of the defendants to the sufficiency of the bond were overruled, as were those of the State to the plea of *non est factum* by the defendant Gary. The case being submitted to a jury, a verdict was returned in favor of the State for the amount of the bond, to wit, \$1,000. A motion for a new trial being overruled, the appellants bring the cause to this court by appeal.

There are four questions presented for our decision, upon which depend the action and rulings of the court below upon all points raised by the appellants. The issues in this case are upon legal principles, and not upon facts. Let us condense and re-state the issues. 1st. Must the bond in terms require the principal to appear and answer the offense? 2d. If the bond was signed in blank by the sureties, knowing the purposes for which it was intended to be used, to be filled by others, are they liable on such bond? 3d. By the return of the sheriff upon the *capias* issued for the same offense it appears that the principal had been re-arrested; can the sheriff's return be contradicted so as to show in fact that he was never arrested? 4th. There having been a trial and verdict for

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the appellants, had the court below the legal right to grant the *State* a *new trial*? Let us notice these propositions in the order in which they are stated. 1st. Must the bond require the principal to appear and *answer* the offense, or charge?

This bond sets out the offense with which the principal is charged, and for which the bond was given to secure his appearance. The bond is conditioned that he, Baker, "shall make his personal appearance before the Criminal District Court of Galveston county, at the next ensuing term of said court, to be begun and holden in the city and county of Galveston, on the 7th day of September, 1874, and there to *remain* from day to day and from term to term until discharged, then this bond shall be null and void, otherwise to remain in full force and effect." This is not in the usual form. The condition does not require the principal to "*answer* the charge preferred," nor said charge, or the offense alleged against him. We think, however, that, as the offense is named in the bond, the court, time and place for his appearance specified, and that he is required to attend from day to day and from term to term, until discharged, it was not necessary for the bond to contain the condition, to "*answer* the charge," or to "*answer* the offense," etc. This precise question came before our Supreme Court in two cases, and it was by that court decided in both cases that it was not required. Believing the decision in those cases to be correct, we are not disposed to overrule them. *State v. Becknall*, 41 Texas, 319; *Goldthwaite v. State*, 32 Texas, 599.

2d. The bond being signed in blank, are the sureties liable? The facts in relation to this matter are these. The day before the bond was given, Baker went to the justice and asked for a blank bond, in order to get the signatures of the sureties, and intending to waive an examination and give bond. The justice gave him the

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blank bond. Baker presented this blank bond to Gary, telling him that he would be required to give a bond for the sum of three hundred dollars, and asking him to sign the bond for that amount. Gary signed the bond for that amount, but did not expressly authorize him or any person else to fill the blank for any other amount. The bond was not filled in his presence, or with his knowledge, authority, or consent, unless expressed from his signing in blank. Baker on the next day waived an examination and presented to the justice this bond, signed by Gary. The justice filled the blank, fixing the amount at \$1,000. The blanks being all filled, the bond was then signed by Baker and Bondies, and was approved by the justice. Bondies in his answer alleges that he signed the bond in blank. The evidence does not sustain him in this, but evidently shows to the contrary.

Under the above state of facts, is Gary liable on this bond thus executed? We are of the opinion that he is. If the justice of the peace in this case occupied the same relation in the bond to the surety, Gary, as the holder of a bill or note does to the maker who signed the note in blank, the sureties' liability could not be questioned; for it is now settled that, if a party sign his name to a blank paper, to be afterwards filled, as bills and notes, over his signature as drawer or maker, and afterwards completed by the holder, he becomes absolutely bound as if he had signed them after their terms were written out. Further, that the fact of his name being upon the blank purports and is in law authority to the holder to fill them with any amount, and "with any terms as to the time, place and condition of payment;" and that, though the party may annex limits and conditions as to the terms and amount, if these are not known to the holder and are exceeded by the person in whom he confided, the maker, or drawer so signing is nevertheless liable. Nor does the principle apply to negotiable instruments alone; it applies as well

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to non-negotiable as to negotiable paper, and our own Supreme Court, supported by authority and, as we think, reason and justice, have extended it to deeds signed in blank.

Concerning the supposition that the justice bears the same relation to the surety, Gary, as the holder of a note does to the maker, it may be urged that, as the justice knew that Gary signed in blank, he was bound to inquire as to the extent of the authority, and, failing in this, if the authority was exceeded and violated, the surety would not be bound. The authorities are divided upon this point. We are of the opinion, however, that those holding that the holder is not bound to inquire are evidently sustained by reason and justice. When Gary signed the bond in blank, knowing the purpose for which it was intended, he made Baker his agent, and when presented to the justice, thus signed, it was in effect saying to the justice, "fill the bond for any amount, I am his surety." He is therefore estopped from urging the breach of trust and confidence by his agent. The power of his agent was without limit upon its face. The justice, being ignorant of the restriction *in fact*, was not bound thereby, but had a right without further inquiry to presume good faith on the part of Baker, the agent, and insert the \$1,000, and approve the bond thus executed by all the parties. We think the authorities fully sustain the above views.

The *third* proposition: That the principal, Baker, being arrested upon the same charge, as appears by the return, was it permissible to contradict the return by showing in fact that he, Baker, was not arrested? We will consider this question upon the supposition that the return of the sheriff that he had "executed" the *capias* was equivalent to a return stating that he had "taken the body" of the principal, Baker. The question is presented for decision: Was it permissible in *this* case to allow the

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State to contradict this return, and prove that in fact Baker was never arrested? The defense aimed at consists of facts. Certain facts must have occurred in order to support this defense. The principal must have been arrested in *fact*, upon the same charge. If Baker was arrested upon the same charge, then the defense was complete; if not arrested, then no defense. Is the return conclusive of this fact? The common law will not permit returns to be contradicted. In this State this question is not settled. In one case the return is held *prima facie*, that is, it is spoken of as such; in another, fraud or mistake must be shown. An exact state of facts similar to those of this case has not been passed upon by our Supreme Court,—to wit, a case in which the return shows service when in fact there was no service.

We are of the opinion that when no rights have vested, no rights of *bona fide* parties intervened, that the return is only *prima facie* proof. The contrary doctrine would result in some cases in great wrong, without any fault, to the party injured. To remit the party to his action of damages against the sheriff in a great many instances would be fruitless. The sheriff may be insolvent, and so may be his sureties. Let us suppose a case. A. sues B. on a claim to which B. has a good defense. The sheriff or constable returns that he has served B., when in fact he has not. A. gets judgment against B. by default; execution issues against him, whereupon he, B., seeks to set aside the judgment upon the ground that he has had no notice of the suit:—must he be told *by a court of justice* that he can not and will not be heard, and to pay the money and look to the sheriff or constable? This appears to us to be in violation of that principle which will not permit a citizen's property to be taken without due course of law. No principle can be just which deprives a person of his property without giving him a hearing.

We have been considering this case upon the supposi-

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tion that the return of the sheriff purports an arrest of the principal, Baker; concluding upon that view that the return would not be conclusive. But this return is not the usual nor the proper return. It does not purport to be an arrest of the principal. The ordinary and, we think, the proper return to be made is that the *capias* was executed by arresting or taking the body of the party mentioned therein. But, be this as it may, the Code provides that when a defendant, who has been arrested for a felony, under a *capias*, has previously given bail to answer said [the same] charge, his sureties should be released by such arrest, and he shall be required to give new bail. The arrest operates the release; it must be proved. Nor will any return of the officer conclude this fact and thereby deprive the State of the right of showing the truth of the matter. The return is not a process in this case, but is independent, extraneous matter, upon the truth of which an issue can and rightfully should be found. That Baker was arrested in fact is not affirmed, nor will it be asserted by any one with the least respect for the evidence as shown by the statement of facts.

The fourth proposition. The jury having returned a verdict for the appellant, was it legal for the court below to grant the State a new trial? The learned counsel for the appellants insist that as, under the decision of this court, *scire facias* cases are criminal in their nature, and as a new trial cannot be granted in criminal cases, therefore the verdict of the jury in favor of the appellants was an end to the matter. To solve this question, it is necessary to refer to a provision of the Constitution and to article 3135, Paschal's Digest, which is a provision of the Code of Criminal Procedure. The Constitution provides that no person for the same *offense* shall be twice put in jeopardy of life, nor shall any person be again put upon trial for the same *offense* after a verdict of *not guilty*. The appellants were not prosecuted for an offense, nor

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was the verdict "not guilty;" hence this provision has no application to the point at issue. Article 3135: "A new trial can in no case be granted when the verdict has been rendered for the defendant." In what character of cases the article does not state, but evidently in cases in which the party is prosecuted for an offense. This provision was in full force and effect when appeals were allowed the State in *scire facias* cases. It follows, therefore, that, if the State had the right of appeal the effect of which would result in a new trial to the State, if successful, the court below could have legally granted it in the first instance. The right to appeal by the State in these cases, to wit: *scire facias*, was in force at the time when the new trial was granted; this being the case, the action of the court in granting a new trial cannot be questioned. But suppose it to have been otherwise, it does not follow that because the State has no right of appeal in these cases, and that they are criminal in their character, it was not entitled to a new trial. There are cases in which the parties have a right to new trials, yet are denied the right to appeal. We fail to see the correctness of the conclusion sought to be drawn from these facts.

We have endeavored to give to the propositions presented by counsel for appellants the closest examination. We have, however, failed to discover any such error as requires a reversal of the judgment. It must be affirmed.
Affirmed.

E. P. ERVIN v. THE STATE.

SWINDLING.—See an indictment for swindling which is held insufficient under the law as it was prior to the enactment of March 26, 1881, entitled "An act to prescribe the requisites of indictments in certain cases," but commonly known as the "common-sense indictment act." It seems that even under the said act of 1881, an

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indictment for swindling is bad unless it alleges that the defendant obtained the property *by means* of the false representations; and that an averment that the person swindled believed the false representations and by reason thereof parted with his property to the defendant is not tantamount to the allegation that the defendant obtained the property by means of the representations.

APPEAL from the District Court of Polk. Tried below before the Hon. EDWIN HOBBY.

The indictment charged that the appellant, on November 15, 1879, "did fraudulently represent to one J. A. Handley that he, the said Ervin, owned and possessed thirteen hundred pounds of seed cotton, and that if the said Handley would let him have thirty-five dollars worth of merchandise out of the store of him the said Handley that he the said Ervin would transfer and deliver to him the said Handley the said thirteen hundred pounds of seed cotton, and that he the said Handley, believing said fraudulent representations and by reason thereof, did sell and deliver said merchandise to him the said Ervin. And the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Ervin, at the time of said fraudulent representation, did not own or possess said cotton as he so fraudulently represented; but that said fraudulent representations were made with the intent then and there of him the said Ervin to fraudulently obtain said goods from said Handley, and to appropriate the same to the use of him the said Ervin; against," etc. The cause came to trial in December, 1881, when the defendant was found guilty and his punishment was assessed at a term of two years in the penitentiary.

The defense moved in arrest of judgment, and as causes therefor alleged that the indictment charged no offense; that it did not allege that any specific property was acquired by the defendant, nor charge the value of the merchandise therein mentioned, nor allege when the

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same was acquired by the defendant. The motion was overruled, exceptions reserved, and notice of appeal given.

J. M. Crosson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Appellant was convicted of swindling. There was a motion in arrest, based upon the insufficiency of the indictment.

The indictment in this case tested by the well settled rules of criminal pleading, and the decisions of our Supreme Court and Court of Appeals, is fatally defective. We refer to the decisions made upon the law in force prior to the passage of what is known as the "Common Sense Bill." And though the form prescribed in that bill for an indictment for this offense is quite plain and simple, this indictment will not bear the test under the provision of that form. It is required under that form to allege that defendant did obtain the goods, *etc.*, *by means* of the false representations. Neither this allegation nor one of similar import is found in this indictment.

The judgment is reversed and the cause dismissed.

Reversed and dismissed.

EX PARTE CHAPMAN PRICE.

COUNTY CONVICTS.—In 1877 the appellant was convicted of misdemeanor and adjudged to pay a fine and costs amounting to about fifty dollars. Failing to pay he was hired out as provided by law, and the hirer gave bond to the county judge for payment of two dollars per month for the services of appellant until the fine and costs should be paid thereby. This contract was never annulled, but, after the lapse of more than four years, the fine and costs being unpaid by the hirer and his bond found worthless, a *capias pro fine* was issued and the appellant taken and detained by virtue thereof.

Argument for the appellant.

Thereupon he sued out *habeas corpus* to the County Court, and on the hearing thereof the hirer was allowed to testify, over objection by the appellant, that he hired appellant for only two months. The County Court remanded the appellant into custody until the fine and costs should be fully paid; and from this judgment he appeals. *Held*, that the trial court erred in admitting parol evidence contrary to the conditions of the bond, and erred in not discharging the appellant from custody. Whatever may be the liability of the hirer, and notwithstanding the worthlessness of his bond, the fine and costs are settled so far as the appellant is concerned, and he is no longer liable for their payment.

APPEAL from the County Court of Fayette. Tried below before the Hon. JOHN C. STIEHL, County Judge.

The opinion states the case.

Duncan & Meerscheidt, for the appellant. The court predicated its judgment on the evidence of Fleming Price, whom the court permitted to come in and, in contradiction of the written agreement, to testify that he hired this applicant for only two months. He states also that he had applicant with him for a long time, and never gave him back to the authorities of the law. To the introduction of this testimony the applicant excepted, and also to the judgment of the court.

For the consideration of the court we desire to submit the following propositions:

1. When a person is convicted of a misdemeanor, and is hired out, and bond executed to the county judge in the manner prescribed for hiring out county convicts, the County Court loses its jurisdiction and custody of the convict, unless the convict makes his escape from the hirer and is re-arrested before the bond becomes due.

2. After the convict is hired and the bond taken and approved, the State and county no longer look to the convict for the payment of the fine and costs, but look to the hirer and his bondsmen.

3. When a convict is hired out, and the bond and

Argument for the State.

agreement show that he is hired out till his fine and costs are discharged, and the convict stays his time, and never escapes from his hirer and is never delivered into custody before the bond becomes due, then the convict is no longer amenable to the jurisdiction of the court which fined him. And if the hirer and his bondsman become insolvent in the meantime, the convict cannot be again arrested on a *capias pro fine* and imprisoned till he pays such fine and costs.

4. If the hirer gives a bond and signs a written agreement, and takes the convict and keeps him as long as he wants to, neither the State nor the hirer should be permitted to contradict and impeach said written document, or show that the agreement of hiring was different from the stipulations of the written contract.

5. If the State hire out a convict, the bond and agreement are conclusive as between the State and the convict, and, in order to hold the convict liable, the State shall not be permitted to impeach the bond after it is due, by showing that there existed a different contract. If the conditions of the bond were obtained by fraudulent representations to the hirer, it is only a question between the hirer and the State, and cannot affect the convict; and the State cannot take advantage of the wrong or fraud of her own officer, especially after the bondsmen and hirer have become insolvent.

H. Chilton, Assistant Attorney General, for the State. The rule disallowing the contradiction of a written instrument only applies to parties and their privies. Defendant was not a party to the hiring agreement and bond.

Now it is undoubtedly true that if defendant had been held to labor by a hirer, and his liberty had been to that extent checked, then, for whatever time he was so restrained, he would be entitled to have it credited on the fine and costs.

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But, every case must be decided on its own particular circumstances. Here the father of the boy — the guardian of his person — has hired him. The fact that defendant stayed at his father's house after the expiration of two months is not material, because not inconsistent with the idea that he was staying there as the *son* rather than the *hired hand* of his father. If he had proved affirmatively that he worked there *under the contract*, and upon the faith of *being credited with his time*, then there would be much more color in defendant's pretense.

WHITE, P. J. On the 7th of November, 1877, the appellant was adjudged guilty in the County Court of Fayette county on a prosecution for disturbance of religious worship, and judgment was rendered imposing a fine of twenty-five dollars and costs against him. By virtue of an act of the 15th Legislature, entitled "An act to provide for the employment and hiring of county convicts," etc., approved 21st August, 1876 [Gen'l Laws 15th Legislature, p. 228], a contract was entered into between one Fleming Price, the stepfather of the convict, and J. C. Steihl, county judge of Fayette county, conditioned as follows, viz.: "It is therefore agreed by and between the above named contracting parties that the said John C. Steihl, county judge as aforesaid, shall hire said Chapman Price, convict, to the said Fleming Price for the sum of \$2 per month until the amount of said fine and costs shall be discharged; and the said Fleming Price agrees on his part to pay for the labor of said convict at the rate above named, and in the manner following, to wit,—two dollars at the end of each month; and he further agrees to treat said convict humanely and furnish him with suitable food, clothing, and, if necessary, medicines, and also to use all proper diligence and care to prevent the escape of said convict. In testimony whereof," etc. Signed and executed by the parties on the 8th day

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of November, 1877. Bond and security for the faithful performance of his obligations under the contract was at the same time executed by Fleming Price, and approved by the county judge.

There was no rescission of this contract; no surrender by the hirer of the convict to the proper authorities, nor any notice that he desired to surrender him up, or that he wished to abandon his contract. Nor was there any action had on the part of the county judge or other authorities showing dissatisfaction on their part, or a desire to change or forfeit the contract. In fact nothing further is heard of or done concerning the matter until the 13th day of February, 1882, four years and three months thereafter, when defendant, the convict, was arrested by virtue of a *capias pro fine* issued by the county clerk to collect the fine and costs on the judgment for disturbing religious worship. Appellant was arrested on this writ, and, having been placed in jail by the sheriff, sued out a writ of *habeas corpus* before the county judge, claiming that he was illegally restrained of his liberty, and that, on account of the facts above stated and which were pleaded by him, he was entitled to be discharged. On the hearing upon the writ applicant not only established the above facts but the further fact that he remained with and worked for his hirer from the date of the execution of the contract,— never ran away,—and that his employer had never delivered him up. The exact date when he left or quit working for the hirer is not shown.

It was also shown that the county judge had told Fleming Price and his surety, Barfield, that he held them responsible for the fine and costs, and that Fleming Price then told him he was unable to pay them. When this occurred is not shown; presumably it must have been at or about the time of the issuance of the *capias pro fine*, and doubtless was the inducing cause for its issuance. Fleming Price, who was a witness at the *habeas corpus* trial,

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which was also had before the same county judge, Steihl, was permitted by the judge, over objection by appellant, to testify that he had only hired and only intended to hire the convict for a period of two months. The objection to this testimony was that it varied the terms of the written contract. In support of the admissibility of this testimony it is insisted that the rule disallowing the contradiction of a written instrument only applies to parties and their privies, and that applicant was not a party to the agreement or contract and bond for hire. He may not have been one of the contracting parties, it is true, but that he was as much if not more interested in it than any one else, is, we think, equally apparent. He was the subject-matter of the contract, in fact its most important factor, and the beneficiary when its conditions should be complied with. That he could avail himself of any attempt to alter, change or vary it after he had become entitled to its benefits and protection, we think too plain to admit of argument. As well might it be said that he should not be allowed to set it up at all and show, if he could do so, that his fine and costs had actually been paid by the hirer in pursuance of it. The construction of a contract does not depend upon what either party thought, but upon what both agreed. *Brunhild v. Freeman*, 77 N. C. 128.

This contract, in our opinion, speaks for itself, and if it does not then the hirer and the county judge should have taken some steps to have made it known sooner to applicant, who, for aught that appears, worked for the hirer a sufficient length of time to have paid off almost double the amount of the judgment against him. So far as he is concerned, the fine and costs appear to have been legally discharged, and he is entitled to be discharged from any further liability on account of them [Code Crim. Proc. art. 814], no matter what liability may attach to the hirer. And the fact that the hirer and his surety may

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be insolvent, and that the judgment cannot be collected of them, does not deprive him a single whit of his right to a full, complete and final discharge from the judgment.

The judgment of the County Court of Fayette county, refusing to discharge and remanding the prisoner to custody till said judgment be paid, is reversed, and appellant is hereby discharged from the illegal restraint and custody in which he is held by virtue of the *capias pro fine*.

Reversed and appellant discharged.

11	544
29	568

QUIRINO GAITAN v. THE STATE.

1. PRACTICE IN THIS COURT — EVIDENCE.— The admission of evidence by the trial court will not be revised on appeal unless it was objected to at the trial, either when it was offered or subsequently by motion to exclude it from the jury, nor unless the objections themselves are disclosed and verified by the record.
2. MURDER OF THE FIRST DEGREE — PROOF OF EXPRESS MALICE.— To warrant a conviction for murder of the first degree, it is incumbent on the State to prove that the killing was done on express malice, and with a sedate, deliberate mind and formed design; but nevertheless a homicide may be murder of the first degree although the result of the sudden execution of an immediate resolve to kill or to inflict serious bodily injury which may result in death, and in such cases the *indicia* of express malice may be evidenced by the cool, calm and circumspect deportment of the slayer at the time of the fatal act, and immediately anterior and subsequent thereto,— by the absence of a provocation or exciting cause,— by the nature of the fatal act itself, and the character of instrument used, as well as the manner of its use.— by declarations indicative of the state of mind or the motives of the slayer,— or by other evidential circumstances pertinent to the issue.
3. SAME.— It is not necessary that the evidence of express malice shall demonstrate it to mathematical certainty. The requisite degree of certainty is such as is reasonably sufficient to satisfy and convince the jury.
4. DRUNKENNESS.— In a trial for murder the defense, with reference to the question of manslaughter, asked the following instruction to

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the jury: "You may take into consideration the fact that the defendant was intoxicated at the time of the commission of the crime, in deciding the adequacy of the cause of the passion under which he acted, or if the cause of his passion was adequate in law to reduce the crime from murder in the second degree to manslaughter." *Held*, properly refused by the court below because incorrect as a legal proposition. The ebriety or inebriety of the slayer cannot affect the existence or non-existence of the "adequate cause" without which there can be no manslaughter.

5. FACT CASE.— See evidence held sufficient to sustain a conviction for murder in the first degree.

APPEAL from the District Court of Cameron. Tried below before the Hon. JOHN C. RUSSELL.

The indictment in this case was presented on December 17, 1881, and charged that the appellant, on or about the 13th of the preceding August, did feloniously and of his malice aforethought cut, stab and kill Luz Contreras with a certain knife. The cause came to trial in the latter part of December, 1881, and the trial resulted in a verdict which found the appellant guilty of murder in the first degree, and assessed his punishment at death.

The defendant and the deceased and most of the witnesses were Mexicans, and the developments at the trial are somewhat characteristic. The homicide was committed at or about midnight, in immediate view of many persons who were looking on at a *baile* or *fandango*,—a dancing party or ball,—assembled at the "fandango grounds" of the city of Brownsville.

Juan Ruiz was the first witness introduced by the prosecution. He stated that on the night of August 13, 1881, he was acting as special policeman of the city of Brownsville, and was on duty at a *baile* or *fandango* in the suburbs and within the limits of the city. Witness saw Quirino Gaitan, the defendant, there in company with Simon Delgado and Juan Medina. They were walking about the fandango grounds, and defendant was annoy-

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ing some of the people there by acting in a disorderly manner. Witness warned him once or twice, and told him to behave, and that he had better go outside of the ball ground. Defendant said all right, and that he would do so, and the witness saw the defendant and his companions go outside of the enclosure where the dancing was going on, and observed the defendant walking beyond the row of benches on which the people were seated. Suddenly, at a spot where the defendant was, the people rushed together and separated, and then the witness saw the defendant spring out of the crowd, with a bowie knife in his hand. Witness ran to the scene of the disturbance, and there found Luz Contreras, the deceased, covered with blood, with a knife-wound in the abdomen, and dying. Some one cried out "Quirino Gaitan has killed Contreras." Witness then went back into the dancing ground. He saw the defendant go across the dancing ground at a rapid gait, and, holding his knife over his head, saw him jump over the benches and run for the fence. Witness followed the defendant, and the latter fled. Witness called out, "Quirino Gaitan, surrender!" Defendant replied, "I will show you how I will surrender, you son of a bitch," and, turning, rushed on the witness. At this stage of his testimony the witness explained that he was advised by his legal counsel not to state what next ensued between the defendant and himself, but he received a knife wound and was not able to arrest the defendant, who was arrested by some other person. When witness got back to the dance-ground, he was told that Contreras was dead. A butcher knife was exhibited which the witness identified as the knife which the defendant had at the dance the night Contreras was killed. Defendant habitually carried such a knife, but witness had been informed that the particular knife in question belonged to Ambrosio Gaitan, the brother of the defendant. The deceased Contreras was a hackman, and

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had his hack on the grounds. He was standing outside the row of benches on which the people were seated, and was twenty or thirty feet from them, looking after his hack and team. He was a good, honest, hard-working, quiet and peaceable man, and was generally known as such a man. When witness told defendant to go outside the dancing enclosure, the latter went direct to where the deceased was standing. Witness observed him up to the time the people made the rush, and then saw him, with the knife in his hand, spring back from where Contreras was standing.

Miguel Gatica, for the State, testified that he was at the ball the night of August 13, 1881, when Luz Contreras was killed. Witness was walking along behind the defendant and the latter's two companions, Juan Medina and one Simon whose surname was unknown to this witness. Defendant and his companions had just passed by where the witness and some friends were eating watermelons, and witness followed a few feet in their rear. Witness observed the defendant swagger to one side and step on the foot of Contreras, who was standing near the corner of the dancing ground, but outside of the row of benches on which the people were seated. Contreras was speaking to no one and doing nothing. When the defendant stepped on his foot he said, "Why, my friend, are you driving a cart?" The defendant replied "Why; don't you like it?" and Contreras responded "Why should I like it?" Then the defendant cried "See how you like this, then!" drew his knife and, with an expression too filthy for repetition, plunged the knife into the abdomen of Contreras. Defendant then ran into the dancing ground, and Juan Medina followed close behind him. In trying to put the knife back into his belt the defendant let it fall, and as he stooped to pick it up he said to Medina "Never mind; I have fixed him." Defendant then went across the dancing ground, and witness saw no more of

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him. After Contreras was stabbed he stood for a moment with his arms folded across the wound, saying nothing, and turned and walked to his horses and leaned against them. A boy took him by the hand and said "What is it?" and he only replied that it was not serious. Then he fell to the ground and expired within a few moments.

Before the defendant trod on the foot of deceased the latter had not spoken a word, and all he then said was the expression "Why, friend, are you driving a cart?" He made no motion with his hand behind him, nor any other threatening gesture; nor did he use any bad language towards the defendant. After he died his body was examined, and there were no weapons of any kind upon it or anywhere about the spot where he was killed. The defendant was walking straight before he swaggered to one side and stepped on the foot of the deceased. It was midnight when the deceased was stabbed, and he did not live ten minutes after the wound was inflicted. The stab was the full width of the knife, and in the abdomen somewhat on the left side.

Juan Medina, for the State, testified that he knew the defendant well, had known him for years, and had been his companion and friend. On the night of August 13, 1881, witness accompanied defendant and his family to the ball. Witness, together with defendant and Simon Delgado, was walking about in the dancing enclosure when Ruiz, the policeman, told the defendant he had better go outside the enclosure and not annoy the families. Defendant and witness and Delgado passed out through the aisle left between the benches, and proceeded beyond the row of benches until they came to the corner of the ground where Luz Contreras was standing; and at that point the defendant swaggered to one side and stepped on the foot of Contreras, who, speaking to the defendant, said, "Friend, are you driving a cart?" Defendant answered, "Why, what of it, don't you like it?" and Contreras re-

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replied, "How should I like it, senor?" Then the defendant said, "Cabron! (a very insulting epithet) take this then and see how you like it," and, using an infamous expression to Contreras about his mother, plunged his knife into the abdomen of Contreras, near the left side. The defendant immediately went rapidly into the dancing ground, holding the knife in his hand, and, as he was attempting to put the knife into his belt, it fell and he stooped to pick it up, saying in Spanish, "Never mind, I have fixed him." Witness ran behind the defendant into the dance ground, but did not follow him farther. The defendant ran and jumped over the benches, with the knife in his hand and the policeman in pursuit of him. Contreras, the deceased, had made no remark before his foot was stepped on by the defendant. He made no movement as if to draw a weapon, nor did he make any threat or threatening gesture. When the defendant, with witness and Delgado, approached Contreras, the latter was standing outside of the dance ground, and near his back. If Contreras had made any offensive movement towards defendant, the witness said he would certainly have observed it. Defendant, witness and Delgado had just come from the interior of the ball ground, and were promenading around when the affair occurred. Defendant had not stopped to speak with any one. Witness did not see Antonia Gaitan, defendant's sister, sitting near the place at which Contreras was standing. Before encountering Contreras the defendant did not go to where the women were sitting; but, after he stabbed Contreras, he ran over to where his sister Antonia was sitting and spoke to her before he ran away.

This witness stated that he testified at the inquest held upon the body of the deceased, the day after the killing. When first called as a witness on that occasion he was afraid to tell all he knew, because he knew the bad character of the defendant and his brother Ambrosio, and

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knew they would do him some injury if he testified against the defendant. At the inquest he first stated that when the trouble began he ran away and did not see the end of it; but afterwards, and on the same day, he returned before the inquest and told the whole truth just as he had been relating it on this trial. Witness had been threatened by the Gaitans if he should testify against the defendant, and he was afraid of them. The defendant had taken a drink or two the night of the ball, but he was not at all drunk, and he knew very well what he was doing. Once or twice he acted as if he was drunk, but that was before he went outside of the dancing ground. When he approached where the deceased was standing he was not drunk and did not stagger. Nor was witness himself drunk on that occasion. With the testimony of this witness the State rested.

Joseph Hull was the first witness introduced by the defense. He stated that he was a resident of the city of Brownsville, and was at the ball the night Luz Contreras was killed. He was then in company with defendant's sister, Antonia Gaitan, and was standing and talking with her when the defendant with two companions passed by. Witness saw the defendant step up to Luz Contreras, the deceased, and heard the sound of their voices as if in conversation with each other. He heard the voice of each of them, but could not understand anything said by either. They were talking in an ordinary tone of voice, and not in a loud or excited tone or manner. Witness was not paying particular attention to them, but presently he observed Luz Contreras put his hand behind him as if to draw some kind of weapon, perhaps a knife or a pistol. Then the defendant rushed on Contreras and stabbed him. Contreras did not actually draw any weapon, because as he put his hand behind him the defendant stabbed him. Witness was on the right of Contreras when the latter put his hand behind him, and witness

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saw the motion quite distinctly. The moon was shining brightly, and there were a great many lights about the ball grounds; and a person could see quite plainly. Before the blow was struck, and while the defendant was talking to the deceased, the witness observed that his woman, Antonia, looked scared and angry; but he could not say why she did so. While the defendant, witness and Delgado were coming along, the defendant was joking about some candy he had won in a raffle on the grounds. He had the candy in his hand and gave some of it to his sister Antonia. A diagram of the grounds, showing the positions of the different persons, was shown to and approved by the witness.

On his cross-examination the witness stated that he lived with Antonia Gaitan, the defendant's sister; she was witness's woman or mistress. He was not married to her, but had been keeping her for more than two years. She had a husband living. Witness did not see the deceased talking to her, and had never stated that the deceased was talking to her. At the examining trial witness stated that he himself was talking to her near where Contreras was standing, when the latter was cut. At the examining court the witness did swear that he knew nothing at all about the matter, but in saying so on that trial he did not tell the truth. At the time he did not want to tell what he knew, and had his reasons for not wanting to tell, but declined to state what those reasons were. His present testimony, nevertheless, was the truth. When the defendant approached the deceased, the latter was standing about fifteen steps from the benches on which Antonia was sitting with other women.

Ramon de la Rosa, for the defense, testified that he was at the ball on the night of August 13, 1881, when Contreras was killed by the defendant. Coming towards the spot at which Contreras was standing, outside of the row of benches, the witness observed the defendant standing

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in front of Contreras. Witness heard the defendant, speaking to Contreras, say something like "It is not as you say," and use a bad expression at the same time. The defendant lunged forward and plunged his knife into the body of Contreras. Defendant was the only person close to Contreras, who was standing with his arms folded across his breast, doing nothing. Witness did not hear Contreras speak to the defendant or any one else, and was certain he made no threatening gesture towards the defendant. Had he made a movement as if to draw a weapon, or any offensive movement against the defendant, the witness was positive he would have seen it. Antonia Gaitan, the sister of the defendant, was sitting with other women on the benches around the dancing ground, and was ten or fifteen steps from where the deceased was stabbed. After the blow was struck and the defendant had run away, witness heard Antonia Gaitan call out not to kill her brother; this was while the pursuit of defendant was going on, and some one was shooting at him. Witness saw the deceased, after he was cut, walk to his horses and lean against them, and within a few moments saw him dead on the ground at the same spot. It was about midnight when these things occurred. The witness did not at the time know Juan Medina, and could not say whether Medina was near by when the deceased was killed. An ordinary butcher-knife, with a blade about eight inches long and an inch and a half wide, being exhibited to the witness, he said it looked like the knife used by the defendant on the occasion in question.

Antonia Gaitan was the last witness introduced by the defense. She testified that in the night of August 13, 1881, she was at the ball, and was sitting with other women on the benches around the dancing ground, when Luz Contreras came up and accosted her. He asked her if there was any reason why he should not sleep with

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her that night. She got frightened at this,— “was scared because Contreras made her ashamed before the women.” Contreras turned and walked away, but witness was still scared when her brother, the defendant, came to her and said, “What is the matter, Nina; why are you scared?” Witness did not tell him why she was scared, because there was no necessity to tell him; he had already heard Contreras when the latter said the bad thing to her. Defendant gave witness some candy which he had won in a raffle, and then he walked over to where Contreras was standing, a few feet distant, and witness heard the defendant talking to Contreras. Then she saw Contreras draw out a big knife to kill her brother with, and then her brother, to save himself, had to kill Contreras. Witness saw the knife when Contreras had it in his hand; he had it raised and in front of him, trying to cut the defendant.

On the cross-examination of this witness she stated that she knew when the inquest on the body of Contreras was held before the justice of the peace, and knew at the time it was held that her brother was being charged with the crime of murder. She was in town when the inquest was held, and at that time knew all the facts she now swore to. She did not appear or testify at the inquest, because she was not sent for. She would not have come now if she had not been sent for; because she was not willing to go to court unless she was asked or told to do so. She stated that a good many persons must have overheard what Contreras said to her, but she could not name them because she could not remember who the women were who were sitting near her at the time Contreras addressed the bad language to her. She was much alarmed by his telling her that he wanted to sleep with her.

The defense having closed, the State, in rebuttal, introduced George More, who testified that he was at the ball in the night of August 13, 1881, when Luz Contreras was

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killed, and saw the body of the deceased near his horses. He saw the fatal wound; there was but one, and it was in the abdomen of the deceased, on the left side. Witness saw the body examined just after the killing; no weapons were found on or near it. The witness knew Luz Contreras as a good, peaceable, quiet and industrious man. Witness was clerk of the inquest held upon the body of the deceased, and heard Joseph Hull testify on that occasion. At first Hull swore positively that he knew nothing about the killing of Contreras; but, after a good deal of questioning, he made a statement which the witness took down in writing, and which Hull signed by making his mark to it. This document being produced, it was identified by the witness, and then read in evidence to the jury,—as follows:

“I was standing at the candy shop when Quirino Gaitan and Juan Medina came up to the candy shop. Gaitan won some candy at a game they were playing; he then walked off towards the entrance of the baile. I seen Luz, the carriage-driver, standing a short distance from where I was standing talking to my woman, Antonia Gaitan. I seen Quirino Gaitan make a rush or plunge on Luz Contreras, the carriage-driver. Contreras, the carriage-driver, then put his hand up to his stomach, and walked off in the direction of the carriages. Attached diagram shows as nearly as possible the position of the parties at the time of the cutting.” The diagram here referred to places Hull at a somewhat different standpoint from that designated in the diagram approved by Hull in his testimony at bar, and in some other particulars the two diagrams do not correspond.

Resuming his testimony the witness More stated that Juan Medina testified twice before the jury of inquest. In his first statement to the inquest Medina did not tell all he had stated in his testimony at the pending trial; but he voluntarily returned before the inquest and said

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he wished to tell the whole truth about the matter,— saying he had been afraid to tell it all because of the Gaitans,—and then he related to the inquest the same facts he had testified at bar.

J. I. P. Franklin, for the State, testified that he was at the spot where Contreras died, and saw the body within a few moments after death and before it had been touched. There were no weapons of any kind on or near the body. Deceased was lying near his carriage horses, thirty feet or more from the nearest benches, and a greater distance from those on which the women had been sitting. Witness saw the defendant that night, at the ball. Defendant looked as if he was slightly intoxicated, or else he was acting as if he was drunk; witness could not say which, but at that time he concluded that the defendant was only acting drunk, as men at fandangoes often do. Witness saw the defendant when the latter ran away; he did not appear to be drunk then. The witness pursued the defendant, and fired at him. This concluded the evidence in the case.

With reference to manslaughter and the testimony of Antonia Gaitan, the court below charged the jury as follows:

“15. Insulting words or conduct of the person killed towards a female relation of the party guilty of the homicide are deemed in law adequate causes.

“16. When it is sought to reduce the homicide to the grade of manslaughter by reason of the existence of the cause specified in the next preceding paragraph, it must appear that the killing took place immediately upon the happening of the insulting conduct or uttering of the insulting words, or so soon thereafter as the party killing may meet with the person killed after having been informed of such insults; and the jury are at liberty to determine in every case whether, under all the circumstances, the insulting words or gestures were the real cause which provoked the killing.”

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“18. You are further charged that if the proof satisfies you that the defendant was a relation of Antonia Gaitan, and the proof further satisfies you that the deceased had used insulting words or conduct towards her, and it further appears from the evidence that the killing took place immediately upon the happening of the insulting words or conduct, or so soon thereafter as the defendant met the deceased after being informed of the same; then, under the law of manslaughter, the defendant is guilty of manslaughter, and you will so find in that case, and assess his punishment at not less than two and not more than five years' confinement in the State penitentiary.”

The defense moved for a new trial, but the motion was overruled.

J. C. Scott, for the appellant. The court erred in permitting the jury to take with them in their retirement extracts from the depositions of Joseph Hull. At the coroner's inquest held over the body of the deceased, Luz Contreras, August 15, 1881, the above named witness was called and deposed as to what he knew of the stabbing of the deceased. By reference to the statute regulating the taking of depositions in criminal cases before examining courts, and also to the transcript of this case, it will be seen that none of those circumstances concur which make it possible for the State in this case to introduce those depositions at the trial, much less to permit the jury to take them into the jury room when they retired to consider a verdict. Criminal depositions are unknown to the common law, and statutes creating them and regulating their introduction as evidence must be *strictly construed*. Not only this, but it appears from the words of the statute that their introduction can under no circumstances be legal unless the requirements therein contained be fully complied with, and it does not appear to alter the case that it was sought to impeach a witness

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by their introduction, which was the object in view when they were introduced in the present case.

These depositions are not sworn to by the district or county attorney, or by any other credible person as required by law, and furthermore the witness Joseph Hull was there in court and had just testified. Code of Crim. Procedure, arts. 772 and 773; *Johnson v. State*, 27 Texas, 765.

The court erred in overruling the motion for a new trial, for the reasons therein assigned why a new trial should be granted.

First. The State did not prove by circumstantial or positive evidence that the defendant acted with *express malice*.

Express malice is said to exist when one person kills another with a *sedate, deliberate* mind and *formed design*. Such *formed design* may be evidenced by *external circumstances* discovering the inward intention, as by lying in wait, antecedent menaces, former grudges and concerted schemes to do the party some bodily harm.

Malice of all kinds must be inferred, because it consists in a quality or state of the mind either actual or imputed. Its actual existence may be manifested by *external circumstances* from which it may reasonably be inferred. *In the absence* of these external circumstances which make it manifest, it is in some cases *imputed* as a legal inference without reference to whether it exists in fact or not.

From this it would appear that the State must show the existence of some "external circumstance," such as "lying in wait, antecedent grudges or former menaces," from which could be inferred the contested point that the defendant at the time had a *formed design* to do the deceased "some bodily harm."

If a man kills another *suddenly without any* or without a considerable provocation, the law *implies malice*. (4 Bl.

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200; 20 Texas, 530; Hale, P. C. 455; 5 Yerg. 340.) But it is equally well understood that the law never implies *express malice*.

By an examination of the record it will be found it does not contain a particle of testimony showing "antecedent grudges or former menaces," or ~~any~~ other circumstance from which a preconceived and deliberate intention to do the deceased some bodily harm could be inferred. On the contrary, the transcript shows that at the time of the stabbing the defendant was intoxicated. In this condition it was even impossible for the State to prove the existence of express malice. For, even then the defendant must have a deliberate and sedate mind, and this certainly could not be the case when his reason was dethroned by whisky. While under the new law intoxication evidently does not mitigate the penalty for an offense, at the same time it appears that the statute above referred to does not obviate the necessity of the State proving the existence of express malice.

The fact that the circumstances of killing occurred so quickly and that deceased called the defendant "amigo" (friend) is further proof that there was no malice aforethought. *McCoy v. State*, 25 Texas, 37; *Farrer v. State*, 42 Texas, 265; *Brown v. State*, 4 Texas Ct. App. 276; *Colbath v. State*, 4 Texas Ct. App. 80; Wharton on Homicide, § 35.

Second. The defendant was not guilty of murder in the second degree.

Under the express words of the statute, insulting words used by the deceased to a female relative of the defendant are sufficient cause to reduce the crime to *manslaughter*. But the fact that it was proven at the trial that Luz Contreras made the insulting proposition to the sister of the defendant seems to have been utterly ignored by the jury.

Admitting that Antonia Gaitan was a woman of bad character, as in fact she was in so far as she was the ac-

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knowledgeed mistress of Joseph Hull, her testimony certainly could not be attacked on *that score*, much less wholly disregarded and held for naught, as seems to have been the case. Penal Code, art. 597.

Third. The defendant killed the deceased in the lawful defense of his person and life.

Proof was produced at the trial showing that the defendant had good reason to believe that deceased intended to making a deadly assault on him, and he need not have retreated. Penal Code, arts. 572 and 574; *U. S. v. Witterberger*, 3 Wash. (C. C.) 517; *Shorter v. The People*, 2 Comst. 193; *State v. Harris*, 1 Jones (N. C.), 190; *Pond v. The People*, 8 Mich. 150; 1 Bishop's Crim. Law, 135.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. Appellant was tried upon an indictment charging him with the murder of one Luz Contreras in Cameron county on the night of the 13th day of August, 1881. He was found guilty of murder of the first degree, and by the verdict and judgment rendered his punishment was assessed at death.

Several grounds are set forth in the motion for new trial, the principal one being that "the court erred in permitting the jury to take with them in their retirement extracts from the testimony of Joseph Hull." It appears that the evidence embraced in this ground of complaint was the deposition of the witness as taken at the coroner's inquest held over the body of the deceased on the 15th of August, 1881. As stated and argued in the brief of appellant's counsel, the objection to this evidence was that the prerequisites of the statute [Code Crim. Proc. arts. 772, 773, 774] had not been observed in the preparation of the evidence, nor complied with in the proposed introduction of said testimony. Whether these objections are well founded or not, it is impossible for us to

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determine from the record. No objection to the admissibility of the testimony appears to have been interposed by defendant at the time it was offered, and no subsequent motion was made to exclude it; and there is no bill of exceptions showing the objections and verifying their correctness. This should appear in the record, else there is nothing in the points made upon which this court can pass advisedly. *Ballinger v. State*, on motion for rehearing, decided at the present term, *ante*, p. 323. For aught that appears the evidence went to the jury without objection from defendant, and he is in no attitude permitting him to complain of its admission now. *Johnson v. State*, 27 Texas, 758.

Another objection insisted upon against the validity of the judgment is that the evidence fails to show express malice, the essential ingredient of murder of the first degree; and it is contended that if the killing was not upon self-defense then the crime was manslaughter, or at most murder in the second degree. All of these issues were submitted by the court in a charge to the jury which is characterized by apparent fairness and sufficiency.

It is true that the express malice necessary to constitute murder of the first degree must be shown, and shown too as the result of a sedate, deliberate mind and formed design to kill. "But, as has been frequently held by this court (as was said in *Farrer v. State*), it does not follow, because the killing may be the result of the prompt and speedy execution of a hasty or immediate resolution, that it may not have been done with express malice. The law has no scales to measure the time in which a sedate, deliberate mind may reach a formed design to kill or to do some serious bodily injury which may probably result in death. When such design is once formed, the haste with which it is put in execution in no way affects or modifies the character of the act, or the degree of guilt thereby incurred. As the difference in the degree of murder does

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not result from the length of time taken to form the design, or the speed with which it is executed, but upon the state and condition of the mind in which the design is formed, it is obvious that it will often be difficult, in homicides without antecedent explanatory facts showing their true character, to determine to which class the particular case under consideration belongs. It is always to be borne in mind, however, whatever difficulty there may be in establishing the fact that the killing was with express malice, still it is incumbent upon the State to prove it before the accused be properly convicted of murder of the first degree. This may be done by proof of the cool, calm and circumspect deportment and bearing of the party when the act is done, and immediately preceding and subsequent thereto; his apparent freedom from passion or excitement; the absence of any obvious or known cause to disturb his mind or arouse his passions; the nature and character of the act done; the instrument used as well as the manner in which the murder is committed; declarations indicating not only the state of the mind but also the purpose and intent with which he acts, and the motives by which he is actuated; and all such other matters and things pertinent to the issue which may be suggested by the facts." *Farrer v. State*, 42 Texas, 265.

Thus it will be seen that, whilst express malice must be proved, it is not required that it should be demonstrated to mathematical certainty by the evidence; all that is required is that the evidence be such as might be reasonably sufficient to satisfy and convince the jury of its existence. *Richarte v. State*, 5 Texas Ct. App. 359; *Jackson v. State*, 9 Texas Ct. App. 114. No evidential fact can be demonstrated. Whart. Cr. Evid. § 7.

Upon the theory of the defense that the killing was prompted by passion aroused on account of insults offered by deceased to the sister of defendant, the charge of the

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court fully presented the law of manslaughter as applicable to such state of facts. *Eanes v. State*, 10 Texas Ct. App. 421.

Amongst other requested instructions asked for defendant and refused by the court, we find the following, viz.: "You may take into consideration the fact that the defendant Gaitan was intoxicated at the time of the commission of the crime, in deciding the adequacy of the cause of the passion which actuated, or if (whether?) the cause of his passion was adequate in law to reduce the crime from murder in the *second degree to manslaughter*." This instruction is manifestly incorrect as a legal proposition. Manslaughter, under our statute, depends wholly and entirely upon the existence or non-existence of *an adequate cause* sufficient to render the mind incapable of cool reflection. Penal Code, art. 593 *et seq.* There can be no manslaughter which is not predicable upon *adequate cause*. *Hill v. State*, decided at the present term, *ante*, p. 456. Whether the party committing the homicide was sober or intoxicated cannot affect the question of the existence or non-existence of such adequate cause, and without the adequate cause there can be no manslaughter. As was said in *Farrer's case*, *supra*: "It is therefore quite obvious that the mere fact of being drunk, or the mere mental excitement or ungovernable passion and rage which may be engendered by drinking intoxicating liquors, will not mitigate the criminality of a voluntary killing below the grade of murder." 42 Texas, 272.

Evidence of intoxication or drunkenness is of vital importance only in the class of offenses in which criminality depends solely or to a certain degree upon the state or condition of the mind at the time the wrongful act is done, showing the ability or inability of the mind to form or entertain a sedate or ordinate criminal design. *Ferrell v. State*, 43 Texas, 503; *Scott v. State* (present term). Such evidence may be essential in determining the degrees of

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murder, or in showing total want of criminal intention, and consequent immunity from any responsibility whatsoever. *Colbath v. State*, 2 Texas Ct. App. 391.

When we consider the sufficiency of the evidence in connection with the principles of law above enunciated, we find no occasion or reason to interfere with the verdict and judgment rendered, finding appellant guilty of murder of the first degree. There are in the record before us no circumstances, even the slightest, of mitigation, much less justification or excuse, for the gross, wanton and unprovoked murder by appellant of a quiet, peaceable, inoffensive and unarmed man.

The judgment of the court below is in all things affirmed.

Affirmed.

AMANDA RHODES v. THE STATE.

1. **CONFESSIONS MADE IN ARREST.**—There is an established distinction between the competency as evidence of acts done and confessions made by a defendant in arrest. The former are admissible, but the latter, unless clearly within the provisions of the statute, are not admissible.
2. **SAME — CASE STATED.**—It being already in proof in a trial for theft of money that the defendant and her little daughter were arrested for the offense, and that disclosures made by the latter induced the officer to take the defendant to her house, with expectation of recovering the money there, the State was further allowed, over objection by the defense, to prove that the defendant, after reaching her home, and while still in arrest and uncautioned, voluntarily raised a plank and seemed to be searching under it for the money. *Held*, that there was no error in allowing this act of the defendant to be put in evidence. It was not a confession.
3. **ACCOMPLICE TESTIMONY.**—In a trial for theft the daughter of the accused was a witness for the State, and it was in proof that she had falsely denied any knowledge of the stolen money. *Held*, that this fact alone did not suffice to render her an accomplice witness.
4. **PRACTICE IN THIS COURT.**—Though in a felony case it is the duty of the trial court to charge the law applicable to every legitimate

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phase of the case, yet the omission to do so is not necessarily erroneous when it is not palpable and radical, and was not called to the attention of the trial court.

5. THEFT OF LOST PROPERTY.—The case of *Robinson v. State, ante*, p. 408, cited with approval on the subject of the theft of lost property.

6. SAME—FACT CASE.—See evidence held sufficient to sustain a conviction for the theft of lost money.

APPEAL from the District Court of Limestone. Tried below before the Hon. L. D. BRADLEY.

The indictment charged that on June 7, 1881, the appellant fraudulently took, stole and carried away four hundred and forty-four dollars, the property of Mrs. R. E. Stephens. A description of the money was set forth in the indictment, showing all of it to have consisted of United States Treasury and national bank notes, except seventy dollars in United States gold coin, and nine dollars in silver. The trial resulted in a verdict of conviction, and the assessment of the appellant's punishment at a term of two years in the penitentiary.

Mrs. R. E. Stephens, for the State, testified that on June 7, 1881, about an hour before sunset, she started home from the house of Mr. Strain, her son-in-law, having with her a small red leather "lady's companion," and in it \$444 in money of the description set out in the indictment. When witness started home she put the companion with its contents on the seat of her buggy, but her little niece, who was with her, moved it from the middle to the end of the seat, and occupied the space between the witness and the small satchel or "companion." After driving a half or three-quarters of a mile on her road towards home, witness missed the satchel and drove rapidly back in search of it. She did not know where it had dropped out of the buggy, but knew it was lost between Mr. Strain's and the point at which she missed it. Just before she got back to Mr. Strain's gate she met the

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defendant and her little daughter, and spoke to them, but it did not occur to witness that either of them had the satchel and money. Witness had known the defendant for years, and before emancipation, and had never heard that the defendant could read. In witness's little satchel there were other articles besides her money; there was a small pocket-knife, an ivory memorandum, and a large piece of pasteboard with her name on one side and a verse on the other. The money was restored to witness the next day by Mr. McLendon, a deputy sheriff. Some of the other articles in the satchel, but not the satchel itself nor the pasteboard, had also been returned to witness. The girl who was with the defendant had a bag or sack in her hand. The defendant knew witness well, and knew that Mr. Strain was the son-in-law of witness. Until recently the defendant had often been on the farm where witness had lived for many years.

Mary Rhodes, for the State, testified that she was twelve years of age and a daughter of the defendant. On June 7, 1881, about an hour by sun, while witness and the defendant were on their way home, they found a lady's companion in the road near Mr. Strain's gate. It was in a wagon-track about seventy yards from the gate. Witness picked it up and put it in a sack in which they had some squashes. She put it in the sack because her mother told her to do so. They met Mrs. Stephens just after they passed Mr. Strain's gate. They did not examine the companion until they got home, nor did the defendant have it before they reached home. Witness, in the presence of the defendant, took it out of the sack and saw the money, and laid the satchel and money on a table, and then went out of the house. She had never seen the money since, and did not know what became of it or the companion since she laid them on the table. She did not see Mrs. Stephens until after she put the money in the sack. Her mother told her to open the satchel, after they got home.

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J. W. Stephens, for the State, testified that he was a son of Mrs. R. E. Stephens, and, hearing in the night of June 7, 1881, that his mother had lost her money, he went to the house of the defendant and told her of the loss and where Mrs. Stephens thought she dropped the satchel. Witness described to her the satchel and its contents, and, in reply to his question if she had found it, she denied that she had seen it, and said she had seen no such satchel. This was early in the night of June 7, 1881, and the defendant's husband, Allen Rhodes, came home about nine o'clock. Cynthia Stroud, another negro, was there. Deputy Sheriff McLendon soon came, and he and the witness arrested the defendant and her daughter Mary. Before they were arrested they denied any knowledge of the satchel and money. McLendon and the witness took the defendant and her daughter about half a mile from their home, and kept them in arrest all night. The next morning, in consequence of a statement made by Mary Rhodes, the witness and McLendon took her and the defendant back to their house, expecting to get the money. When they got there the defendant took up a plank and looked under the floor, like she was looking for the money; but she produced nothing. (The defense objected to this evidence, on the ground that the act of the defendant was in the nature of a confession, and she was in arrest and uncautioned when it was done. The court overruled the objection, and the defense reserved exceptions.) The witness further testified that he went out of the defendant's house to look after another negro, and when he came back McLendon had the money and was counting it.

Thomas McLendon, the deputy sheriff, for the State, testified that in the night of June 7, 1881, he arrested the defendant and her daughter Mary on a charge of theft of Mrs. Stephens's money. The next morning he took them back to the defendant's house. While there the witness saw Cynthia Rhodes (meaning the woman called Cynthia

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Stroud by the preceding witness) go into another cabin. Witness followed her and told her she had the money and must give it up. At first she denied having it, but afterwards she got \$365 of it, which was in United States currency, and gave that to witness. She got it from about her bed. Witness then went back to the house of the defendant, and she gave him the gold and silver, which amounted to about \$79. Witness restored the money to Mrs. Stephens.

The defense proved that the defendant could not read nor write.

M. D. Herring and *B. M. Burrow*, for the appellant. Where two parties are arrested charged with the same offense, theft of money, and one of the parties while so under arrest makes statements to the officer, which induces him the next morning to take both parties back to their residence, and after so being under arrest all night, and taken back home, the other party takes up a plank and looks under the floor, like she was looking for the money, but produced nothing, it is a verbal act in the nature of a confession, and is not admissible, unless the party was cautioned.

When the confession of the main fact in issue would not be admissible, evidence of a collateral fact tending to establish the main fact is also inadmissible. *Haynie v. State*, 2 Texas Ct. App. 168; *Davis v. State*, 2 Texas Ct. App. 588; *Taylor v. State*, 3 Texas Ct. App. 387; *Marshall v. State*, 5 Texas Ct. App. 293; *O'Connell v. State*, 10 Texas Ct. App. 567.

Defendant charged with stealing bacon proved that "when defendant was arrested and carried to the house at which he lived, he placed a certain saddle on the horse ridden by him to the justice's office, and that upon the saddle were found marks of a rope and grease, which to witnesses looked like bacon grease." Objected to, but

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grounds of objection not stated. No exception reserved. Held, Hurt, Justice: "This is too vague; the ground or reason for the objection should have been stated, and if defendant had objected because defendant was under arrest and the proper predicate had not been shown, a very serious question would have been presented." *Cohea v. State*, ante, p. 153.

If defendant is guilty of theft, then her daughter Mary *may* have been an *accomplice* to the said crime, and the charge of the court should have instructed the jury in relation thereto. All the law applicable to every phase of the case should be charged, whether asked or not, in felonies. *Kelly v. State*, 1 Texas Ct. App. 637; *Johnson v. State*, 27 Texas, 758; *O'Nealy v. State*, 1 Texas Ct. App. 180; *Bishop v. State*, 43 Texas, 390; *Riojas v. State*, 8 Texas Ct. App. 49; *Talbot v. State*, 8 Texas Ct. App. 412; *Lindley v. State*, id. 445; *Scott v. State*, 10 Texas Ct. App. 112.

Where a material witness for the State *may* have been an *accomplice* in the offense on trial, the court should charge the law as to the evidence of accomplices. *Kelly v. State*, 1 Texas Ct. App. 637, in which the charge was not requested. *Hoyle v. State*, 4 Texas Ct. App. 239. *Wright v. State*, 7 Texas Ct. App. 574, in which case it is said "that the question as to whether the witness was or was not a guilty confederate was properly submitted to the jury, with appropriate instructions upon the law controlling accomplice testimony, and its effect upon the case if they found witness to be such confederate."

There can be no theft in this State without the defendant, *at the time he obtained possession* of the *property*, intended to deprive the *owner* of the value thereof, except in two cases:

- 1st. Where the taking, originally lawful, was obtained by some false pretext, and the same is appropriated to the use and benefit of the taker.

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2d. Any other unlawful acquisition of personal property, punishable by the Penal Code.

The statute in terms says, "the taking must be wrongful, so that if the property came into possession of the accused by lawful means, the *subsequent appropriation* of it is not theft; but if the taking, though originally lawful, was obtained by any false pretext, or with intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete." Penal Code, art. 727. Under this provision, the intent must exist to deprive the owner of the property when the possession is obtained, in every case *but one*, and that is when a false pretext is used in obtaining possession. The general definition is, that theft is the fraudulently *taking* . . . with intent to deprive the owner of the value of the same. Penal Code, art. 724.

The case does not come within the definition of any other unlawful acquisition of personal property punishable by the Penal Code. Code Crim. Proc. art. 714. If it did, the instructions of the court are not applicable to such case. *Vincent v. State*, 10 Texas Ct. App. 331.

That the finder of lost goods is in the lawful possession of them is elementary, and needs no citation of authorities.

Mr. Bishop says: ". . . Lost goods, which a person takes into his possession lawfully, not knowing the owner, and afterwards ascertains who the owner is, yet with felonious intent converts it to his own use, he commits no larceny." 2 Bish. Crim. Law, sec. 841. Again he says: "The finder has the right to appropriate lost goods to himself, subject to the claim of the owner. He therefore gains, immediately upon finding, a special kind of property in the goods, of such nature that where there is no larceny in the original taking, there can be none in any subsequent misappropriation . . . with a full knowledge of the true ownership." 2 Bish. Crim. Law, sec. 859.

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“The law gives the finder a title in lost goods, but it is not full and unconditional; so if he takes them with intent to steal them, he commits a larceny. The doctrine therefore is that if, when one takes lost goods into his possession, he sees about them marks, or otherwise learns any facts, by which he knew who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise not. . . . The guilt of the defendant must attach at the moment, if ever, without depending on an if.” 2 Bish. Crim. Law, sec. 860.

Justice Winkler, in *Reed v. State*, recognizes and applies these principles to a case of lost goods. He says, “In all cases the taking must be wrongful. If the property came into the possession of the accused by lawful means, the subsequent appropriation is not theft; but if the taking, though originally lawful, was obtained by any false pretext, or with intent to deprive the owner of the value thereof, . . . and the same is so appropriated, it is theft.” Citing Penal Code, art. 727, he proceeds, after reviewing the evidence: “Under these circumstances the jury were warranted in coming to the conclusion that the defendant *when he obtained possession* of the pocket book, whether he found it himself, or obtained it from another, intended to deprive the owner of it and assume dominion over it.” *Reed v. State*, 8 Texas Ct. App. 41. He deduces these general rules for lost goods, but applies them in connection with the above citation from the Penal Code.

Again, Justice Hurt says in a case of lost goods: “Suppose that at the time of the taking defendant knew, or had reasonable grounds for *believing*, that there was an owner to whom he could have delivered them, and if so knowing he intended to deprive the owner of their value, and appropriate them to his own use, he would be guilty; citing *Statum v. State*, 9 Texas Ct. App. 273. This was a cause where the accused saw the owner drop money in the presence of accused, and he put his foot on it until

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the owner turned away, and then picked it up. The intent to appropriate was properly referred to the *time of the taking*.

In an English case, Bovell, C. J. (12 Cox's Crim. Cases, 489), says: "The prisoner found two heifers strayed, and put them on his own marshes to graze. Soon after, he was informed by S. that they had been put on his, S.'s, marshes, and had strayed, and that they belonged to H. Defendant left them on his marshes a day or so, and then sent them a long distance away, as *his own property*. He then told S. he had lost them and denied all knowledge of them. The jury found, 1st, that at the time defendant found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner; 2d, that *at the time of finding them he did not intend to steal them*, but that the intention to steal came on him subsequently; 3d, that the prisoner, when he sent them away, did so for the purpose of and with the intent of depriving the owner of them and appropriating them to his own use. Held, "not having any intention to steal when he *first found* them, . . . unless there was something equivalent to a bailment afterwards, he could not be convicted of larceny. On the whole we think there was not sufficient proof to make this out to be a case of larceny by a bailee." *Regina v. Matthews*, 1 Green's Criminal Reports, 32.

Another case: "Prisoner received from his wife a £10 Bank of England note, which *she had found*, and passed it away. The note was indorsed E. May only, and the prisoner, when asked to put his name on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, he said he knew nothing about the note. Held, the jury ought to have been asked whether the prisoner, at the time he *received the note*, believed the *owner could be found*, and

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the conviction was wrong." *Rex v. Knight*, 12 Cox's Crim. Cases; 2 Green's Criminal Reports, 35.

Riddle, Justice, in *Bailey v. State*, 52 Ind. 462, says: "If Maffett lost his shoes — a supposition not at all unlikely, considering his condition at the time,—and the appellant merely found them and took them, not knowing, and not having the means to find out, who owned them, he cannot be guilty of larceny, however reprehensible his conduct be afterwards, in attempting to appropriate the shoes; and his conduct may be interpreted as nothing more than an attempt to fortify his claim to the shoes he had found, instead of stolen. We are of the opinion the conviction is not a safe one under the law." American Reports, 182.

The finders of a pocket book in the highway, containing bank bills and having the name of the owner legibly written on it, were convicted of larceny *upon proof that they could read*, and had converted the property to their own use. *State v. Weston et al.* 9 Conn. 527, cited in note to *Baley v. State*, 21 American Reports, 187.

From these authorities we deduce the following principles:

1st. The intent to steal must exist at the time of obtaining possession of lost goods.

2d. The third rule laid down in *Reed v. State*, 8 Texas Ct. App. 42, to wit: "Where a man finds goods that have actually been lost, or are reasonably supposed by him to be lost, and appropriates them with intent to take entire dominion over them, *he at the same time* (the time of the finding) knowing, or really believing the owner can be found, this is larceny, whether the finder *afterwards* converts them to his own use or not," means simply that there must be marks, and circumstances, connected with the lost goods and the manner of their being found (intelligible to the finder) which reasonably indicate to the finder, at the time, who the owner is.

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In the very language of the statute: "If the possession of the person accused of theft came by lawful means, the subsequent appropriation of it is not theft, . . . unless a false pretext is used, or [as we claim] the intent to deprive the owner of the value thereof," exists at the time of obtaining possession by lawful means.

Hence as there was no evidence tending to show that defendant obtained the companion and money by any false pretext, the charge should have limited the fraudulent intent to the time of obtaining the possession of the property. *Hudson v. State*, 10 Texas Ct. App. 216; *Hornback v. State*, 10 Texas Ct. App. 408.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. The rules with regard to confessions of a party when under arrest are not applicable to *the acts* of appellant Amanda Rhodes, which were by the court admitted in evidence over objection of defendant. She made no confession. After her daughter Mary had made disclosures concerning the money, the accused voluntarily raised a plank and appeared to be searching for the money. She subsequently produced and handed the officer the gold and silver (\$79), part of the stolen money. Evidence of this latter act or fact was not objected to, and is not now complained of. It was a much more conclusive and damaging confession of guilt than the raising of the plank; and yet we scarcely imagine that it will be contended that such evidence would have been illegal and inadmissible if it had been objected to. A distinction has always been made between acts performed and confessions made by a defendant whilst under arrest. The former are admitted, whilst the latter are not unless coming strictly within the letter of the statute. This distinction was clearly drawn in the case of *Elizabeth v. State*, 27 Texas, 329, wherein it was held that, independent of the confession, the acts of the accused in going to

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the pool of water and bringing from it the dead body of the murdered child were admissible in evidence against her. See also *Walker v. State*, 7 Texas Ct. App. 245; *Preston v. State*, 8 Texas Ct. App. 55.

Nor did the court err in declining to charge the law governing accomplice testimony with reference to the evidence of the witness Mary Rhodes. There is in the record no fact tending to connect this witness as an accomplice with her mother in the theft of the money, save the fact that before her arrest she denied any knowledge of the money and the lady's companion containing it. "Such statements are not evidence of crime where the testimony clearly indicates others as the offenders and furnishes another motive for such statements than concealment of the guilt of the party making them." *Porter v. State*, 43 Texas, 367.

Besides this, no charge was requested on the subject of accomplices; no exception was reserved to the charge for omission in that respect, and no objection to that effect was urged against the charge in the motion for a new trial. And while it is the duty of the court in felony cases to charge the law applicable to every legitimate phase of the case, yet a reversal will not necessarily ensue where the error has not been pointed out in the trial court, unless so fundamental and manifest as to be palpable and radical. But, as was said before, this was not a legitimate phase of the case, there being no evidence going to show that the witness Mary was an accomplice with defendant in the theft of the money. She picked up the companion containing the money, and, at the instance of her mother, put it in the sack she was carrying,—carried it home, neither she or her mother knowing that it contained the money. She carried the sack and contents home, and after reaching there took out the lady's companion, opened it, and for the first time the parties discovered the money. Further than that she had nothing to do with the theft. At that time necessarily the fraud-

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ulent intent to steal and appropriate the money must for the first time have been entertained by the mother. Up to that time she was not aware that the companion contained it; it, the money, was to all intents and purposes still lost up to that time. And whilst her possession of the companion was lawful at the time she found it, the taking and asportation of the money within it was an involuntary act, because she did not know of its existence, and she could not then have entertained any intent, felonious or otherwise, with regard to it, so long as she was ignorant that it was in her possession. When she discovered the money upon her arrival at home, that was the first moment at which she could possibly have formed and entertained a purpose and intent with regard to it. Up to that time the money was lost. *Robinson v. State, ante, p. 403.*

Taking that as the initial point, and we are of opinion that her guilt is clearly established by the evidence. At that very time she had the means of ascertaining who the owner was. For Mrs. Stephens, the owner, swears that the companion also contained a large piece of paste-board with her (Mrs. S.'s) name on it. This certainly was all defendant needed to ascertain the owner. It was sufficient to put her upon inquiry. And though she might not have been able to read herself, and in that way find the owner, she might still, as soon as possible, with little trouble have sought some one who could and would have given her the information. If she did not intend to steal the money at that time, how is her conduct to be reconciled with the hypothesis of her innocence. See *Robinson v. State, supra.*

The charge of the court presented fully the law of the case, and no error is made apparent, sufficient to require a reversal of the judgment. The verdict and judgment are amply sustained by the evidence.

The judgment is affirmed.

Affirmed.

Statement of the case.

JIM ANDERSON v. THE STATE.

1. **THEFT — EVIDENCE.**— When the possession of recently stolen property is relied on as inculpatory of the accused, his explanation thereof is admissible in his behalf though given after he had parted with the possession, provided it was given on the first occasion for any explanation by him. It is not material that the first occasion did not present itself until three or four weeks after he had parted with the possession.
2. **SAME — CHARGE OF THE COURT.**— It was in proof that the defendant was in possession of the stolen cattle soon after they were missed by the owner, and the defense adduced evidence of a purchase of them by the defendant. Counsel for the defense asked an instruction to the effect that the defendant's possession was not an inculpatory fact if he purchased the cattle in good faith and believing his vendor had the right to sell them. *Held* that, whether the requested instruction was correctly framed or not, it sufficed to devolve upon the court the duty of giving to the jury the law which controlled the issue raised by the evidence.

APPEAL from the District Court of Freestone. Tried below before the Hon. L. D. BRADLEY.

Theft of nineteen head of cattle, the property of Jesse Awalt, was the offense charged in the indictment. The jury found the appellant guilty, and assessed a term of five years in the penitentiary as his punishment.

Jesse Awalt, the alleged owner of the stolen cattle, was the first witness for the State. He testified that he was and for thirty years had been a resident of Freestone county, and was the owner of a small stock of cattle, twenty-five or thirty in number, which he had himself raised. They were gentle, and ranged within three miles of home. Witness had no brand, but had an unrecorded mark when he missed nineteen head of his cattle in August, 1881, about the date alleged in the indictment. He searched diligently for them, but had never been able to find them. They bore the witness's ear-marks and were mostly yellow. One was a red cow with dark stripes, and two of the others might be called spotted.

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There were five cows, nine two-year-olds and five yearlings. The last time witness saw them was on the 11th or 12th of August, 1881, at his house. A steer belonging to W. Speed habitually ranged with witness's cattle, but he had not seen it since his own were missed. Speed and witness hunted together for the missing animals, but were unable to find any of them, nor ascertain anything about them except that a drove of cattle had been driven from Freestone county to Corsicana, in Navarro county, about the time these cattle were missing. Witness went to Corsicana and saw F. L. Smithey, the cattle-inspector, and an examination of his books showed that Jim Anderson, the defendant, on the 13th of August, 1881, shipped from Corsicana a lot of cattle, and among them were nineteen in the mark of witness. No person had the consent of witness to take or drive off any of his cattle. He valued those taken at an average of ten dollars per head.

On his cross-examination the witness stated that he never saw the defendant in possession of his cattle, and could not of his own knowledge say that they were stolen by the defendant, nor that those he shipped were witness's. Some time after the cattle were missed, and after witness returned home from Corsicana with the information he got there, he sent for the defendant, with whom he desired to have a talk about the cattle. At this stage of the testimony the counsel for the defendant proposed to elicit from the witness the conversation at his house, with reference to the cattle, which occurred between him and the defendant on the occasion referred to by the witness. Counsel for the State objected, and the court sustained the objection; to which ruling the defense reserved exceptions on the ground that the acts and statements of the defendant when first informed that he was accused or suspected of stealing the cattle were legitimate evidence in his behalf.

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F. L. Smithey, cattle-inspector at Corsicana, for the State, testified that on August 13, 1881, the defendant, accompanied by a young man whom witness did not know, called upon witness to inspect a lot of cattle which the defendant desired to ship. There were twenty-one head of cattle in the lot; nineteen of them were unbranded, but marked with an under-half-crop in the right ear and a swallow-fork in the left,—the same mark previously given in proof by the witness Awalt. Defendant had a bill of sale for the animals, and witness copied the marks and brands from it into his inspection-book, and then examined the animals and found that he had their marks and brands correctly entered. Defendant shipped the cattle that evening.

On cross-examination the witness stated that it was two weeks after defendant shipped them when the witness Awalt came to see witness, and examined the inspection-book. Witness had known the defendant since the latter was a boy, and knew his general character in Navarro county for honesty and fair dealing. It was as good as that of any cattle-man in the country. Witness had never known of any charge against the defendant before this one. For three years the defendant has been engaged in buying cattle for shipment from Corsicana, where the witness inspected them. Defendant had always been particular in his transactions.

Re-examined by the State, the witness testified that the defendant lived about twelve miles from Corsicana, and witness did not know his reputation among his immediate neighbors.

W. Speed, for the State, corroborated the statements of Awalt respecting the steer which ran with the latter's cattle.

F. M. Harris, for the State, testified that he lived in the county of Freestone, about two miles from Awalt's, and three-quarters of a mile from Caney creek. About

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the 10th or 11th of August, 1881, the defendant, accompanied by Pink Harris and Jeff. Dunn, came to witness's house, and inquired if witness knew any one who had cattle to sell. Witness said he did not, and they rode off towards Caney creek, but soon returned and got dinner at witness's. Defendant said, "Well, I don't believe you want to sell any cattle;" and witness replied that he did not. After getting their dinner the defendant and his companions rode off towards Caney creek, and the witness saw no more of them. If they had returned by his house, he could have seen them.

The first evidence introduced by the defense was a bill of sale purporting to have been made by Sam Pryor, in Freestone county, August 12, 1881, and to convey to the defendant twenty-two head of cattle, of which nineteen were described as unbranded, and with the ear-marks delineated as described by the State's witnesses, Awalt and Smithey. The bill of sale expressed a cash consideration of \$176, and bore the name of Jeff. Dunn as a witness. Appended to it was the affidavit of Jeff. Dunn before the county clerk of Freestone county, dated February 21, 1882, which was the day of the trial of this case in the court below. Dunn swore in the affidavit that he saw Sam Pryor subscribe the bill of sale, and that he signed it as a witness at the request of Sam Pryor.

Peter Dunn, for the defense, testified that in the summer of 1881 the defendant, in company with Jeff. Dunn and Pink Harris, came to witness's house late in the afternoon. They brought with them a bunch of cattle, between fifteen and twenty-five head, penned them at witness's, and stayed all night. The defendant said he had bought them in the brush across Tehuacana creek. Two or three days afterwards a man who called himself Sam Pryor came to witness's, and said he was looking for the defendant and had some more cattle to sell him. He asked witness where the defendant lived, and when

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witness gave him directions he started off that way. Jeff. Dunn was in the defendant's employ; he had no regular home.

Bill Harris, for the defense, stated that in August, 1881, he saw the defendant with twenty or thirty head of cattle near Tehuacana creek. Jeff. Dunn and Pink Harris were with him, and also a negro and a man who called himself Sam Pryor. Witness saw the defendant pay Sam Pryor some money, and saw the latter sign a bill of sale for the cattle, and Jeff. Dunn sign it as a witness. On cross-examination the witness said that Sam Pryor dismounted from horse-back to sign the bill of sale, and he and defendant called Jeff. Dunn to come and sign it as a witness. Sam Pryor was a stranger to witness; he was a dark-haired man, heavy set and well dressed. Witness left defendant and his party where he found them.

W. J. Harral, for the defense, corroborated the statements of Bill Harris, the next preceding witness. He saw the defendant write and Sam Pryor sign the bill of sale, and also Jeff. Dunn subscribe it as a witness. He saw the defendant pay to Pryor about \$176 in money, and saw Pryor roll it up and put it in his pocket. On his cross-examination the witness said he had never seen Sam Pryor before that occasion. Pryor had dark hair and eyes, was of medium size, and wore common clothes, like those usually worn by stockmen when they are driving cattle. Witness had the bill of sale in his hands and examined it closely on the occasion in question, and identified as the same the bill of sale introduced by the defense. He could not give the marks of the cattle, but knew that nineteen of them were unbranded. He left defendant and his party where he found them.

Charles McConico, for the defense, stated that he had known the defendant since the latter was a boy, and knew defendant's reputation was good in Navarro county. On

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cross-examination the witness stated that he had recently moved about thirty miles from the defendant, and did not know the present standing of the latter among his neighbors.

The State in rebuttal introduced Walter Bonner, who testified that in August, 1881, and about the time Awalt's cattle were reported stolen, he met and passed a lot of cattle, from fifteen to twenty-five head, near the locality spoken of by the witnesses for the defense; and at the same time he also met and passed Jeff. Dunn and a man whom witness did not know. They were on horse-back, and when witness first saw them they seemed to be driving the cattle; but when witness got close to them they went along as though they had nothing to do with the cattle. The man with Jeff. Dunn somewhat resembled the defendant, but witness could not say he was the defendant. The man seemed darker than defendant looks, but was about the same size. A little further on the witness saw Pink Harris and W. Harral.

W. Croft and Farrar & Kirven, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of the theft of cattle, the property of Jesse Awalt. For a conviction the State relied upon the fact that, some day or two after the theft, the defendant shipped the cattle at Corsicana, and that he was seen in the neighborhood from which the cattle were taken, about the time the cattle were stolen, inquiring of the witness if he had or knew of any cattle for sale.

The first ground relied on shows recent possession of the stolen property in the defendant. This possession, however, had not been questioned. He had not been called on circumstantially, directly, or in any manner to account for or explain his possession, until some time after he had parted with the possession by shipping the cattle.

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If, while in possession, he had been charged with the theft, or in any manner been called on to account for or explain his possession, certainly his right to do so would not be questioned. Does the fact that he had parted with the possession when called upon to explain or to account for it, by the owner, deprive him of his right of explanation, never having had the opportunity of so doing before. The explanation being made (if reasonable) while in possession, and he being *called upon to explain*, compels the State to prove his account or explanation untrue, or to rely upon other facts for a conviction. This is the effect of a reasonable account of the recent possession of stolen property, if the account is given while in possession.

How does the fact that defendant had parted with the possession affect this principle if *when first* called upon he explains? An explanation, though accompanied with possession, unless he were called upon for an account, is not admissible. If, therefore, he explains when his possession is first challenged, or when an account is demanded by the circumstances or directly (the State relying upon the possession), we can see no good reason why these explanations should not be received.

This is evidently the view of this question taken in *Hampton v. State*, 5 Texas Ct. App. 463. Judge Ector states the rule to be this: "The rule of evidence which allows such declarations to be given in evidence by the accused is limited to the time and to declarations made by him when he is first caught in possession of the stolen property,— when he first ascertains, or it is made apparent to him, that his right to the ownership of said property is questioned by some one else. The declarations of the defendant when first caught or found in the possession of the stolen property are admissible in evidence, either for or against him."

The defendant proposed to prove his explanations, made to the owner, and, so far as we are informed by the statement of facts, this was the first time and opportunity at

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which defendant had ever had the (legal) right to account for his possession; he never having been called upon in any manner to explain before. We think the court erred in rejecting this proof. The evidence tends to show that defendant purchased the cattle of one Prior, but, as Prior was a stranger, never having been seen before and but once since, which was a few days after the sale and in the immediate vicinity thereof, that he had stolen the cattle and sold them to the defendant.

Bearing directly upon this phase of the case, defendant, by his counsel, requested the court to give this charge: "If you believe from the evidence that the bill of sale to the cattle described in the indictment was made and executed by one claiming to have the right to sell and dispose of said cattle, possession by the defendant of said cattle under the bill of sale made to him, and claiming the right and authority as before explained, to sell said cattle, would not be illegal, although said cattle may have been stolen by the person selling the same to defendant, unless you believe from the evidence that the defendant knew at the time of the sale that the person selling had no right or authority to sell."

The object of this charge was to meet this phase of the case:—that, if the cattle were stolen by Prior and sold and billed to defendant, and defendant knew nothing of the theft, his possession of the cattle would not be inculpatory evidence. Whether the charge as worded was precisely correct or not, it nevertheless was amply sufficient to call attention to this state of case indicated by the evidence, and a charge should have been given thereon.

We are of the opinion that the court erred in refusing this charge, or, if it was not properly drawn, the court erred in not submitting to the jury a proper charge on this branch of the case.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Statement of the case.

R. A. McWHORTER v. THE STATE.

1. THEFT — POSSESSION OF RECENTLY STOLEN PROPERTY — CHARGE OF THE COURT.— In a trial for theft the court charged the jury as follows: "The possession of recently stolen property is not conclusive evidence of the guilt of the person having such possession; but such possession, if proved, may be taken into consideration as a circumstance, in connection with all the other facts and circumstances which may have been proven in the case, to enable you to determine as to the guilt or innocence of the accused." *Held*, a charge upon the weight of the evidence, and in direct violation of the provision of the Code of Procedure which inhibits such charges. See the opinion *in extenso* on the subject.
2. SAME.— Not the slightest intimation of the opinion of the court upon the facts of the case should be communicated to the jury.

APPEAL from the District Court of Navarro. Tried below before the Hon. L. D. BRADLEY.

The indictment charged the appellant and William McWhorter with the theft of eight mares, four mules, and six geldings, the property of M. S. Finch, senior, and at the same time and place, of two mares and one mule, the property of R. E. Finch. The time of the offense was alleged as March 15, 1877. In January, 1882, a trial of the appellant was had, and resulted in his conviction and the assessment of his punishment at a term of eight years in the penitentiary.

The testimony in the case is prolix, and a detail of it is not necessary. The principal inculpatory evidence was to the effect that the appellant and William McWhorter, just before the animals disappeared, came to the neighborhood from which they were taken, and inquired who had horses for sale, and, after the animals were driven off, a prompt pursuit overtook them and the two McWhorters near Dallas. A fight ensued between them and the pursuers, in which the appellant received a gunshot wound, and was arrested. The defense endeavored to prove a purchase of the animals, and, after the verdict of

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conviction, moved for a new trial on the ground of newly-discovered evidence. Much of the record consists of the affidavits and counter-affidavits relative to the motion. A new trial was refused, and the defendant appealed.

Simkins & Simkins, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. The appellant was convicted of theft. The State relied upon recent possession and conduct of defendant when found in possession of the stolen property. The court below charged upon recent possession as follows: "The possession of recently stolen property is *not conclusive* evidence of the guilt of the person having such possession, but such possession, if proven, may be taken into consideration as a circumstance, in connection with all the other facts and circumstances which may have been proven in the case, to enable you to determine as to the guilt or innocence of the accused."

The defendant moved for a new trial upon the ground that this charge was illegal, the court having no right to charge upon the weight of evidence. This charge is evidently upon the weight of the evidence, and in this respect is in direct violation of the Code upon this subject.

This subject of recent possession is a very vexatious one indeed. The trial courts feel it their duty to touch upon it in their charges, and counsel for defendants are persistent in their efforts to have the courts charge on the subject. It seems to be agreed upon all sides that in every case in which recent possession figures it is the duty of the courts to treat the subject in their charges.

This is a very great mistake. The judge must not charge upon the weight of the evidence. This rule applies to all evidence; how very strange indeed that the opinion should obtain that recent possession is an exception to this rule! Is not recent possession evidence?

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Clearly so. If so, does it not stand upon the same ground (so far as the rule which inhibits the courts from charging upon the weight of evidence is concerned) as any other fact or facts? Certainly it does. The trial courts have no right to charge that it is conclusive or not conclusive, *prima facie*, or that it has any probative force. Neither have the courts the right to charge that it is not sufficient, etc.

If upon the trial of a cause there is no other evidence save the bare recent possession, the party not being required or given an opportunity to explain, or, if called upon directly or by the circumstances to explain, he gives a reasonable explanation, it would not be the duty of the court to charge upon the weight of these facts, but to award the defendant a new trial.

If the court below can, without violation of the Code, charge upon the weight to be given to recent possession, why not upon each and every fact adduced on the trial? If the right obtains in the one case, certainly it will hold good in all, and we will have reached the old times when the trial judges summed up the case, giving their views upon the bearing and weight of each and every fact and circumstance introduced in the case. We are told, however, by our able assistant attorney general that this charge was favorable to the defendant, and that therefore he cannot complain. This is very dangerous ground. In the first place the court violated the law in giving the charge; this being the case, we should be very certain that the rights of the defendant were not injured, when we have to speculate as to the construction the jury placed upon it.

We, however, cannot agree with the view taken of this matter by the assistant attorney general. The court charged that recent possession was not conclusive evidence of the guilt of the party. From this the jury would have the right to infer that it was some if not

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prima facie evidence, and by aiding it with other facts, could reach a verdict of guilty. The court should not give the slightest intimation of his opinion upon the facts.

There are a large number of affidavits and counter-affidavits contained in the motion for new trial. These and the action of the court in overruling the motion will not be noticed, as a new trial will clear the record. The other assignments we think are not well taken.

For the error in the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

B. L. REED v. THE STATE.

1. DISQUALIFICATION OF JUDGE.—The Code of Procedure enacts that no judge shall “sit in any case” where he is the party injured, has been of counsel, or is connected with the accused or the party injured within the third degree of consanguinity or affinity. This provision disables a judge not only from trying a cause in which he is thus disqualified but from making any order in it. On the other hand, if the judge of the forum is not thus disqualified he cannot recuse himself, nor, by certifying that he is disqualified, enable the governor to appoint a special judge to try the cause.
2. SAME — SPECIAL JUDGE — CASE STATED.—Appellant and one S. were jointly indicted for murder, but the latter was never arrested. The judge of the forum, though in no degree connected with the appellant, was related to S. by a disqualifying consanguinity, and therefore entered an order purporting to recuse himself from trying the appellant, and the governor appointed a special judge to try the cause. Appellant filed a special plea alleging that the regular judge of the forum was not disqualified to try him, and that the special judge was not legally authorized to do so; to which plea a demurrer was sustained. *Held* error. The plea was a good one to the jurisdiction of the court. Otherwise, however, if appellant and S. had been jointly on trial.
3. MURDER — CHARGE OF THE COURT.—See evidence in a trial for murder which, it is held, justified the trial court in giving in charge to the jury the law of aiders and abettors.

Statement of the case.

APPEAL from the District Court of Brazos. Tried below before A. C. BRIETZ, Esq., Special Judge.

The indictment was filed September 10, 1881, and charged that the appellant and Reuben Stillwell, about the 23d of the preceding July, did with malice aforethought kill Cicero Porter, by shooting him with a pistol. The indictment was framed in conformity with the act of March 26, 1881, called the "common-sense indictment act." At the same term of the court the appellant alone was tried before a special judge appointed by the governor, in consequence of a notification that the regular judge was disqualified to sit in the case. An order of the court was entered of record, reciting that the regular judge was second cousin of Reuben Stillwell, and therefore was disqualified and recused himself. The defendant filed a special plea, and alleged in it that the regular judge was not disqualified, and that the special judge had no jurisdiction to try him, the defendant. Counsel for the State filed an answer which in effect was tantamount to a general exception or demurrer to the plea. The trial court overruled the plea, and the defense reserved exceptions to the ruling. The defendant was then arraigned and pleaded not guilty. A trial ensued, and the jury found the defendant guilty of murder in the second degree, and assessed his punishment at a term of five years in the penitentiary.

In the town of Bryan, county of Brazos, on the 23d of July, 1881, James Porter and Oliver Porter were shot and instantly killed in Nall's saloon, of which, according to the testimony, Reuben Stillwell was an habitue. The trial from the result of which this appeal is taken was one of the consequences of the homicide. Many witnesses were examined by the State and by the defense, and their testimony is characterized by many circumstantial discrepancies, arising, doubtless, from their different stand-points and the prevailing excitement.

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J. P. Campbell was the first witness examined by the State. From his and other testimony, and a diagram, it appears that Nall's saloon occupies the south half of a brick building, fifty feet wide, which fronts west upon Main street in Bryan. The north half of the building is separated from the saloon by a plank partition, and was occupied as a barber shop at the time of the homicide. On the south of the saloon, and adjoining it, is English's store, and on the north of the barber shop, and adjoining it, is Hanway's store. In the front of the brick building occupied by the saloon and barber shop there were three doors, by the most southern of which the saloon was accessible through self-closing lattice door-shutters. The most northern of the three doors entered the barber shop, and by the middle door access could be had either to the saloon or the barber shop, as the partition between them did not reach the front wall but left a door or passway between the saloon and the barber shop. On the outer edge of the pavement in front of the saloon stood a bench of which frequent mention occurs in the testimony.

The State's witness Campbell testified that as he was passing up the pavement in a northerly direction he observed that in front of the saloon the pavement was occupied by a crowd of men. The defendant Reed was sitting on the bench, and Dr. Erwin was standing about the middle of the pavement. The defendant said, "Let's fight it out right here," and Erwin replied "All right." The defendant got up, advanced, and knocked Irwin down. James Porter was then standing between the defendant and the door of the saloon, and the defendant, on knocking Erwin down, turned so as to approach close to James Porter, who struck at the defendant with a pair of saddle-bags. The witness thought that the saddle-bags "brushed" the arm of the defendant, who thereupon seized James Porter and pushed him through the lattice doors and into the saloon, and while so doing

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was drawing a pistol from his own hip-pocket. The lattice doors immediately closed behind them, and the firing began at once. The witness heard three shots, and then saw Reuben Stillwell run out of the saloon and on to the pavement, bare-headed, in his shirt sleeves, and with a pistol in his hand. For a moment Stillwell stood on the pavement, with his pistol presented as if he was sighting it through the lattice door, and then went back into the saloon. After Stillwell got back into the saloon, the witness heard two more shots in the saloon. The first three shots were fired near the front and the last two about the middle of the saloon, but witness could see none of the parties inside the saloon at the time. After the firing ceased he went into the saloon, and in the space between the front wall and the end of the counter saw James Porter lying dead. About twenty feet from the front of the saloon, and in front of the counter, lay Cicero Porter, dead. The last two shots came from the spot at which he lay, and the witness thought he heard Cicero Porter halloo "Oh Lord," when they were fired. James Porter was shot in the head, and Cicero in the left side. When the difficulty began the witness was on the pavement in front of English's store, and when the shooting began he stepped into English's north door, which was about four feet from the lattice door through which the defendant and James Porter went into the saloon.

On his cross-examination the witness re-stated the brief colloquy between the defendant and Dr. Erwin, thus: "Defendant said 'Let's fight it out;' Erwin said if he had defendant out of the corporation he could whip him; defendant said 'Let's fight it out here;' Erwin said 'all right.'" The witness stated that when the defendant struck Erwin and knocked him down, Erwin was revolving his fists around each other. Witness was certain that when the defendant and James Porter passed through the lattice doorway, the latter was foremost but was

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moving backwards, and the defendant had his hand on him. When the first three shots were fired, Erwin was lying face upwards on the pavement, but when Stillwell came out of the saloon, just after the third shot, Erwin got up and took a seat in the door of the barber shop. Witness was standing in English's door, and could see up and down the pavement. He thought James Porter was killed when the first three shots were fired. When the defendant and James Porter went into the saloon, five or six other persons also went in; some of them entered through the door next to the barber shop. When witness came up to the crowd in front of the saloon Erwin and the defendant were talking. Erwin seemed to be smiling, and told the defendant to "pitch in," or "hit me first." Defendant did not strike Erwin with a pistol, but with his fist. Stillwell came up just in front of the witness, spoke to the crowd, and went into the saloon; he seemed to have just gotten off his horse. Witness did not observe Cicero Porter enter the saloon; he did not know Cicero Porter at that time. Defendant's pistol was short and chunky; it was a bright pistol about five or six inches long. On his re-examination the witness said he did not pretend to describe the defendant's pistol. He saw the bodies of the deceased immediately after the shooting, but did not examine to ascertain whether they were armed. James Porter's head, witness thought, was lying on the saddle-bags.

Willie Wood, for the State, testified that he had been present but a few moments when the difficulty began. Defendant and Erwin were quarreling; Erwin said if he had the defendant out of town he could whip him. Defendant said he would not go, and that there was as good a place as any. Erwin said "square yourself." Defendant got up and approached Erwin, and the latter said "sail in." Defendant knocked Erwin down, and then James Porter struck at the defendant with saddle-

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bags, and they went into the saloon scuffling. Witness thought but was not certain that the defendant went in foremost. While Erwin and the defendant were quarreling, Cicero Porter was standing on the sidewalk. James Porter stepped out of the saloon just as the defendant struck Erwin. Cicero Porter went into the saloon through the door next the barber shop. When the defendant and James Porter got inside the saloon, the latter and Stillwell got together, and the defendant went towards the back end of the room. Witness was then standing with his head between the lattice doors just far enough to see; but as he observed the defendant going towards the rear of the room some person from the inside ran against witness and knocked him outside the doorway. Witness heard Cicero Porter say, "Lucian, don't shoot me, I am not armed;" and immediately a shot was fired, and Cicero Porter said, "Oh Lucian, what did you shoot me for, and me not armed." (Defendant, it seems, was usually called Lucian, presumably his middle name.) Witness knew Cicero Porter's voice well, and could not be mistaken about it. The exclamations came from about the middle of the room, where the body of Cicero Porter was found. There were two shots fired after Cicero Porter asked the defendant not to shoot him. The last that the witness saw of the defendant, the latter was about six feet from where Cicero Porter's body was found, and he was still going in that direction. Witness did not see any of the shooting.

On cross-examination the witness said he was a second cousin to James and Cicero Porter. The defendant knocked Erwin down with his fist. Witness was sitting in a chair on the sidewalk, between the main door of the saloon and the door next the barber shop, and Erwin's head when he fell was close to witness's feet. Ten or fifteen persons were sitting or standing on the sidewalk, and they began to scatter when the defendant struck

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Erwin. James Porter struck the defendant's head or shoulders with the saddle-bags, and they seemed tolerable heavy. Cicero Porter was then standing at the door next the barber shop. Witness did not see the defendant draw a pistol, and thought if he had drawn one before going through the lattice doors, he, the witness, would have seen it. Defendant was in front of James Porter as they went in, and had hold of him with his left hand. Witness saw James Porter, Stillwell, and the defendant inside the saloon, but not Cicero Porter. The witness denied that he had made certain statements inconsistent with portions of his testimony, and in some particulars was subsequently contradicted with respect to them by witnesses introduced by the defense. In his re-examination he stated that he could not see the right hand of the defendant as the latter went into the saloon. Defendant's back was towards James Porter as they went in. On re-cross-examination he stated that the defendant drew no pistol up to the time he entered the house.

J. P. Semones, for the State, testified that he went into the saloon very soon after the shooting. Both James and Cicero Porter were still breathing when witness went in. He examined the bodies and pockets of both of them, and found no weapon upon either. A pair of saddle-bags was lying under James Porter's legs; a pistol was in one end of them, and a bundle of merchandise was on top of the pistol. Witness stated that the flap of that end of the saddle-bags was down, but whether it was buckled down or not he could not say. The other end was buckled down. Cicero Porter's body lay in front of the counter and about midway the saloon, with the head towards the counter. James Porter lay between the end of the counter and the front of the house, with the head next the south wall. Cicero Porter was shot in the left side, and his clothing was powder-burned.

Dr. J. S. Pugh, for the State, testified that he saw the

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bodies of the two Porters, about an hour and a half after they were shot. James had been shot first in the top of the head, and then the muzzle of the pistol had been pushed into the hole made by the first shot, and a second shot fired, bursting the skull and scattering the brains. Cicero was shot between the fourth and fifth ribs on the left side, perforating the apex or lower end of the heart. His clothing was powder-burned for a considerable space around the spot where the ball entered. On cross-examination the witness stated that statistics show that of persons shot through the left ventricle of the heart (as was Cicero Porter) only eighteen *per centum* spoke afterwards, and they spoke rapidly. An acute sense of hearing was necessary to understand anything said under such circumstances. A person so shot could articulate for only a few seconds, and, in witness's opinion, could not speak distinctly enough to be understood outside of the room. The words would come out like bullets, and, to hear and understand them, the listener would have to be very near and the room quiet. The witness expressed a positive opinion that nothing said by Cicero Porter after he was shot could have been heard and understood by a person standing on the pavement in front of the saloon in which the shot was fired. On his re-examination the witness was of opinion that a person shot as was Cicero Porter might have spoken in an audible voice at any instant within thirty seconds. James Porter could not possibly have spoken after he was shot.

James Gates, for the State, testified that he was in the saloon soon after the two Porters were shot, and before they died. Thomas Erwin picked up the saddle-bags, and witness examined them, and under some bundles of goods in one end he found a pistol. When Thomas Erwin picked up the saddle-bags he unbuckled the end in which the pistol was found. Neither of the Porters had any weapons about their persons.

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J. L. Mayo, for the State, testified that at the time of the homicide he was sheriff of the county, and was passing along at a distance of about seventy-five yards north of Nall's saloon when the shots were fired. Hearing them and the scream of a man as if mortally wounded, witness ran towards the rear door of Nall's saloon. Defendant came out of that door and ran northward towards Hearne's saloon. Witness ran after the defendant and called on him to stop, and arrested him near Hearne's rear door, about a hundred yards from Nall's saloon. Defendant had no weapons about him then. Between his right thumb and fore-finger, and for about half their length, there was powder-burn. On cross-examination the witness said that the defendant did not stop when he first called on him to do so, nor until after witness had called upon others to stop him. Defendant was in ten steps of Hearne's saloon when he stopped, and then he came and met the witness.

W. E. Harris, for the State, testified that he was a deputy sheriff at the time of the homicide, and was in Nall's saloon five minutes after the shooting of the Porters. Being informed that a pistol was concealed in a box in the back room of Nall's saloon, he searched and found one concealed in some saw dust. It was a Colt's double-action pistol, nickel-plated, but a little rusty. Two barrels of the cylinder had been recently discharged, and the hammer of the pistol was resting on one of the exploded cartridges. The other barrels were loaded.

Thomas Erwin, for the State, testified that he was in the saloon a few minutes after the shooting. The saddle-bags were lying under James Porter's thighs. Witness took them up and examined their contents. In one side of them there was a pistol, and on top of it a bundle which seemed to be a dress-pattern. That side of the saddle-bags was buckled down, and witness thought it was he who unbuckled it.

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George Pletzer, for the State, testified that he was in the saloon within a few minutes after the shooting, and saw R. M. Nall, William King and another man in the back room of the saloon. A pistol was lying on the floor in the corner next the front room. One of the men picked up the pistol, and Nall put it in a box and covered it with saw dust. Witness at once informed Deputy Sheriff Harris, and saw him take the pistol out of the saw dust.

B. H. Knowls, for the State, testified that when the Porters were killed he was eighty or ninety yards southwest of Nall's saloon, and could plainly see the front of the saloon. He heard shots, and saw Reuben Stillwell come out of the saloon, walking backwards, with a pistol in his hand, and then step back into the doorway, and with his left hand hold open the north side of the lattice door. Just as he did so, the witness heard a shot back in the saloon, and thought he heard some one halloo there. Stillwell dodged a little to one side, and then presented his pistol rather across the door and towards the corner at his right. Witness heard another shot, and saw smoke about Stillwell. On cross-examination the witness said he could not say positively who fired the two shots of which he spoke, but he was satisfied that Stillwell did not fire the first of those two shots. It was fired in the interior of the saloon while Stillwell was standing in the front door. With the testimony of this witness the State closed.

Wiley James was the first witness introduced by the defense. He stated that he was sitting on the bench and alongside of the defendant before the difficulty began. Stillwell came up and took a seat by the defendant. James Porter and several other persons were there. Cicero Porter and Dr. Erwin came up, and the latter asked defendant if he was "on the fight." Then Dr. Erwin and Cicero went into the saloon, and directly they came out

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again, and Dr. Erwin said to the defendant, "Cicero says he can whip you, and I second it." Dr. Erwin cursed defendant, called him a d—d rascal, and told him that if the Porter boys couldn't whip him he could. Cicero Porter said to the defendant, "I had nothing against you, but you acted the d—d rascal." James Porter said, "Yes, you did." Defendant said, "Maybe so." Then Stillwell said to the defendant, "Do you acknowledge that what they say is true?" Defendant said, "Yes," and then Stillwell said the Porters ought to be satisfied, and both the Porters said they were satisfied. When James Porter came out of the saloon he said: "Lucian, why didn't you ask me what I wanted to whip you for? I could have told you, d—d quick." He also told defendant that he had gone to the barbecue last week to see him, but did not find him. Defendant replied, "You have been hunting me, have you?" and James Porter said, "No, but I thought I would see you and we could settle it." The defendant told Dr. Erwin he was not afraid to fight him, but did not want the whole mob to jump on him. Stillwell said he was a friend to both parties, and the mob should not jump on defendant. The Porters said they would not jump on the defendant. Dr. Erwin was standing about the middle of the sidewalk and in front of the defendant, who was sitting on the bench at the outer edge of the sidewalk. Erwin cursed the defendant for three or four minutes, and the defendant got up, started towards Erwin, and began to pull off his coat, but did not do so. Erwin told defendant to hit him first, and the defendant knocked him down. Witness's attention was then turned to Erwin, and he did not see the defendant go into the saloon. He thought Cicero Porter went into the saloon through the door next the barber shop. James Porter and Dr. Erwin were drinking; the defendant was sober. When the firing began, the witness ran and stood in the door of Hanway's store, and as he

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passed the north door of the saloon he looked in and saw the defendant and Cicero Porter near the front end of the counter. Witness thought Cicero Porter had hold of defendant's back, but the witness added that Cicero may have been "trying to part them,"—meaning, it is inferred, the defendant and James Porter. About three-quarters of an hour before the difficulty the witness saw the defendant and Cicero Porter at Dunn's saloon, and heard defendant then ask Cicero what James Porter wanted to whip him for. Witness, apprehending a difficulty, told them that they had been good friends, and ought not to fall out about something Jim Porter had said. They both said no, and the matter was dropped. Witness did not see Willie Wood on the pavement during the shooting, nor did he see Stillwell come out of the saloon with a pistol in his hand, and then return.

John Smith, for the defense, testified that when the difficulty between defendant and Dr. Erwin began he was in the door or on the sidewalk before English's store, and was eight or ten feet from the crowd in front of Nall's saloon. Witness first heard Erwin cursing the defendant. Speaking to the defendant, Erwin said, "We can whip you." The defendant replied, "Say what you have got to say, and go on; I can't fight." James Porter said to the defendant, "G—d d—n you, I went to the barbecue to hunt you and didn't find you, and I have come here to-day to hunt you, and now I have found you and you won't fight,—you won't settle it, and you won't name your time and place." Defendant replied: "You went to the barbecue and you came to town to hunt me, did you?" James Porter said: "No, not particularly to hunt you, but to see if we couldn't settle it." Cicero Porter said to the defendant: "You have acted the s—, and the G—d d—n s—, and we can whip you." Erwin said Cicero Porter could whip defendant, and what Cicero couldn't do he, Erwin, could. Stillwell said he was a

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friend to both parties, but that the whole crowd should not jump on the defendant. Erwin began cursing the defendant again, and defendant got up and said to Erwin, "You hit me." Erwin replied, "No, you hit me," and then the defendant knocked Erwin down, and turned to go into the saloon. As he turned, James Porter struck him over the head with the saddle-bags. Defendant and the two Porters rushed into the saloon, and witness went into English's store. He heard the parties fall inside the saloon door. He started towards the back door of English's store and heard two shots fired in Nall's saloon; and then he turned back towards the front of English's store, and before he reached the front door he heard two more shots fired in Nall's saloon. Witness saw Reuben Stillwell out on the sidewalk with a pistol in his hand. This was the only pistol seen by the witness in the hands of any of the parties. If the defendant had had a pistol during the incidents related, the witness thought he would have seen it. While going into the saloon the defendant was in front of James Porter, and the latter had hold of him. On cross-examination by the State, the witness said that while the shooting was going on, he heard some one in the saloon cry out "Oh, oh," several times. When the parties went into the saloon he heard a slam, and thought they had fallen.

Billy Boyett, for the defense, stated that he was inside the saloon at and before the beginning of the affray. Just before the fight began, James Porter came into the saloon with his saddle-bags. Holding them with his left hand, he had his right hand below the counter and seemed to be unbuckling the saddle-bags. Somebody asked him what he was going to do, and he said something about a cigar. On his cross-examination the witness stated that he did not know whether James Porter was unbuckling his saddle-bags or not; witness could not see Porter's hands at the time. Witness is a brother-in-law of the defendant.

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Charles Needham, for the defense, stated that he was present while Dr. Erwin was "bemeaning" the defendant in front of the saloon. Defendant said: "Dr. Erwin, you must want to whip me mighty bad." Erwin replied: "Yes, I will whip you if you will come out of the corporation." The defendant said they could fight as well where they were, and then Erwin said, "spread yourself then." Defendant got up and told Erwin to hit him first, and Erwin replied, "No, you hit me;" and then the defendant struck Erwin and knocked him down. James Porter struck the defendant with his saddle-bags, and defendant caught him by the arm and pushed him towards the saloon door. Cicero Porter caught the defendant by the neck and shoulders, and all three of them went into the saloon scuffling. James Porter was the foremost of the three, but he went in backwards, and kept running his hand into his hip-pocket. Witness ran into English's store. The combatants fell as they went into the saloon, and the firing began as soon as they got in. Witness heard three or four shots. He did not see defendant have a pistol, and, as he watched the defendant, he thought he would have seen one if exhibited by the defendant. Witness did not see Willie Wood that day. On cross-examination the witness stated that he did not hear either of the Porters say anything. When James struck defendant with the saddle-bags each of them clenched the other by the arms, and they went into the saloon that way, James Porter being foremost and the defendant pushing him. Cicero caught defendant by the shoulders as they went into the saloon. Witness had never told any one that Cicero Porter went into the saloon through the door next the barber shop.

Jim Curry, for the defense, testified that he and others, besides the defendant, were sitting on the bench in front of the saloon when Cicero Porter and Dr. Erwin came up, and the latter told the defendant that what the Porter boys could not do he could, and to name his time, form

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and place and he, Erwin, would be ready for him. Defendant said, "Doctor, you must want to whip me mighty bad." Erwin said, "I do, and if you don't think I can do it, get up." Defendant said he could not fight the whole crowd, and Stillwell said he was a friend to both parties, and the whole crowd should not jump on defendant there. Defendant got up and knocked Erwin down, and then turned to go off and James Porter struck him over the head and shoulders with the saddle-bags. Defendant and the Porters then rushed into the saloon, the former in front, and James Porter continuing to strike him over the head and shoulders as they went in. Before the defendant struck Erwin, Cicero Porter said that defendant had acted the d—d rascal, and James Porter said that defendant had acted more than the d—d rascal. Witness got up when the defendant did, and when the latter struck Erwin the witness ran into English's store. After witness got in English's store, he heard a noise as if the combatants had fallen into the saloon, and heard a voice say, "I don't want to hurt you but you must not crowd me." Witness thought it was Stillwell who said this, but he did not know Stillwell's voice, though they had met frequently. Witness heard four shots. On his cross-examination the witness reiterated positively his statement that James Porter was striking defendant with the saddle-bags as they were going into the saloon, and that the defendant was in front, with his back to the Porters, and was followed by both of them.

Wash Utzy, for the defense, stated that when he got in front of the saloon on the day of the homicide Dr. Erwin was cursing the defendant, who said, "Dr. Erwin, you must want to whip me mighty bad." Erwin replied "No, I don't want to do it, but I can do it," and snapped his fingers in the defendant's face. Erwin said if the defendant would go out of the corporation he could whip

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him; to which the defendant replied, "No, this is as good a place as any." Then Erwin told the defendant to "square" himself, and the defendant got up and knocked Erwin down. James Porter then struck the defendant over the head with the saddle-bags. Defendant went into the saloon with James Porter following him. Witness caught James Porter by the coat, and tried to keep him from going into the saloon, but he went in and pulled witness in after him. As soon as they got inside Reuben Stillwell shot at James Porter, who turned towards Stillwell and said "what are you shooting me for," and Stillwell immediately shot James Porter in the top of the head, spattering his brains upon the witness, who then ran out of the saloon and into English's store. He saw no one in the door as he came out. James Porter had got near the corner of the counter when the first shot was fired by Stillwell, who was standing between the end of the counter and the front of the saloon, and against its south wall, and was on the right of James Porter when he fired. Witness's attention was so engrossed by them that he did not see the defendant and Cicero Porter after they got inside. Defendant had no pistol so far as witness saw. Before defendant struck Erwin, James Porter said to the defendant, "You acted the d—n rascal with me this morning, and that is all I have to say about it." Witness did not see Willie Wood there.

On his cross-examination the witness said he was certain that James Porter and the defendant did not have hold of each other as they went into the saloon, and that the former was not then striking at the latter with the saddle-bags. Defendant was three feet ahead of James Porter, who, as he entered the saloon, held the saddle-bags with his right hand, and hanging down by his side; and he made no effort to use them, open them, or take anything out of them. Nor did James Porter run his hand in his hip-pocket as he went into the saloon; wit-

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ness had hold of him, and, had he done so, would have known it. Cicero Porter did not catch defendant by the shoulders, or have his hand on defendant, when the latter was going into the saloon. Witness was certain that Cicero did not go into the saloon at the same door as defendant and James Porter, though witness could not say by what entrance Cicero did go in. This witness did not see Jim Curry or Wiley James there.

Tom Nunn, for the defense, stated that in the morning of the day on which the Porters were killed they and the defendant were at Dunn's ten-pin alley. James Porter and William King were rolling ten-pins, and Dr. Erwin was betting on the former, who told Erwin not to bet on him, as he couldn't play. Erwin said that he couldn't play, but he could whip the defendant, and James Porter said "I can do that myself." James Porter and Erwin soon left the alley, and the defendant asked Cicero Porter what James wanted to whip him, defendant, for, and said he had nothing against the Porters. Cicero replied that until a few days before that time he had nothing against the defendant, but that defendant had acted the d—d rascal.

On the cross-examination of this witness he said that the conversation between defendant and Cicero Porter at the ten-pin alley occurred three-quarters of an hour before the difficulty at Nall's saloon. Cicero said that the defendant had acted the d—d rascal about "that picture," and said that the defendant was a dirty dog; but did not say what picture. Defendant said "that is durned hard to take, and I have taken enough," and got up from where he was sitting. Some one caught him, and he said "What do you mean? turn me loose." He was turned loose, and then some one got hold of Cicero Porter. State's counsel asked the witness if Cicero Porter did not say that the defendant had acted the d—d rascal in mutilating a picture of Porter's sister and sending it

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to her with an insulting note. The witness replied that Cicero Porter said nothing about a note or whose picture it was. Witness stated that the defendant, previous to the altercation at the alley, said to him, the witness, that he, defendant, had done wrong in tearing up the picture and sending it to Miss Porter. When William King and James Porter were rolling ten-pins Erwin said "we can whip Lucian Reed," and James Porter said: "It don't take *we* to do it; I can do it myself." The witness insisted that in his examination in chief he did not say that Erwin's expression was that *he* could whip defendant. Defendant and James Porter seemed to be friendly at a previous meeting between them that same morning. After the Porters left the ten-pin alley the witness told defendant he was the biggest coward he ever saw, taking the abuse he had.

Charles Sibrell, for the defense, testified that he saw Dr. Erwin take a new pistol out of a desk in Tom Erwin's store in Bryan, the day the Porters were killed; but did not know whether Erwin carried the pistol out of the store or not.

Jack Buchanan, for the defense, stated that he saw the two Porters, Dr. Erwin and defendant together on horses in Bryan, the morning of the homicide. Witness asked James Porter what was up, and James Porter said they were going to have a race, and asked witness if defendant's horse could run fast. Witness told him that the defendant's horse could beat his, Porter's, horse mighty bad. James Porter said he did not care,—he would run the race anyhow. Dr. Erwin said, "Come on, let's go," and then the defendant said, "Let's wait for Nall and Stillwell." Erwin rejoined, "D—n Nall and Stillwell, we don't want to wait for them; let's go and run the race." Witness was a neighbor of defendant, and had known him several years; had never heard him spoken of as a violent or dangerous man, but had never heard his

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character or reputation in that respect called in question or discussed among his neighbors. The defense, after contradicting by several witnesses some denials made by the State's witness Willie Wood, closed the evidence in the case with the testimony of several other neighbors of the defendant, respecting his reputation for violence or the contrary. They concurred in stating that his reputation in that respect had not been a matter of discussion one way or the other.

Beall & Taliaferro, and *Henderson & Henderson*, filed an able argument for the appellant.

H. Chilton, Assistant Attorney General, for the State. The common law rule, which is admitted to be controlling, brings *W. E. Collard* within the third degree to *Reuben Stillwell*; but the presiding judge was not related in any degree to *B. L. Reed*. It is a principle governing all questions of jurisdiction or capacity that the allegations or face of the papers must govern. *Reed* and *Stillwell* are jointly charged. *Reed* and *Stillwell* are both arrested and put on trial,—in such case is the judge disqualified? Clearly so.

But suppose *Reed* and *Stillwell*, being both in arrest, ask a severance. Can the regular judge try one? Clearly not, because in the first place he *has no capacity* or *authority* to grant the severance, his kinsman being a *party* thereto. But suppose *Reed* is arrested and *Stillwell* flies from justice; what then, according to appellant's reasoning, renders the judge qualified? Clearly *Stillwell's* illegal act,—the escape.

Suppose *Stillwell* is in arrest at the first term of the court; who then tries the case of *Reed* and *Stillwell*? A special judge. But suppose the case is not tried and *Stillwell* escapes before the second term; then, forsooth, the authority of the special judge is ousted and Judge Col-

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lard ascends the bench and grants a second continuance to Reed. Before a third term, Stillwell is re-arrested, and then the jurisdiction of the special judge re-attaches to Reed's case.

It seems to me these illustrations are sufficient to expose the argument of appellant.

HURT, J. Reed was convicted of murder of the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years.

One Reuben Stillwell and the appellant were jointly indicted for the murder of Cicero Porter. Stillwell was related to the regular judge (W. E. Collard), being his second cousin. W. E. Collard, being thus related to Stillwell, certified his disqualifications to the governor, who appointed as special judge A. C. Brietz. When the cause was reached and called for trial, the defendant pleaded that the special judge had no proper jurisdiction of defendant or of said cause; that the regular judge of said court, W. E. Collard, was in no manner disqualified to try the case. This plea was overruled by the special judge and defendant excepted.

Article 569, Code of Criminal Procedure, provides that no judge shall sit in any case where the accused may be connected with him by consanguinity or affinity within the third degree. The judge shall not "sit," which evidently means make any orders in or try any case when the party accused, meaning the party to be tried, is related within the third degree. If not related within the third degree, it is the duty of the judge to sit and try the cause; and the defendant has the right to demand a trial by a regular judge. Nor can the judge recuse himself, nor the governor appoint a special judge, unless the regular judge is disqualified, or comes within some of the provisions of the statute authorizing the election or appointment of a special judge.

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The question, therefore, is, was the regular judge disqualified to sit and try this defendant? It is not pretended that this defendant was related in any degree to the judge. The only ground of disqualification was the relationship between him and Reuben Stillwell. But Stillwell had not been arrested; there was no possibility of his being tried. Hence we have this proposition;— when a case is reached and called for trial, is the regular judge disqualified by reason of the fact that some relation within the disqualifying degree is jointly indicted with defendant, though not arrested? We are of the opinion that he is not. There was nothing to prevent his sitting in this cause and trying this defendant. If, then, he was not disqualified to try the defendant, he could not recuse himself, nor could the appointment of the governor invest the special judge with the power legally to try the defendant.

If, however, Stillwell had been arrested, he and defendant being jointly indicted and the regular judge being related to Stillwell, the right of the special judge to try Stillwell would have carried with it the right to try the defendant. This, however, was not the case; Stillwell had not been arrested; the defendant alone could have been tried, and there was no obstruction in the way of the regular judge to try him.

Collateral consequences which may result favorably to Stillwell are not embraced in the statute. Is the regular judge related in the third degree to the person to be tried is the question; if not, though his partiality for his relation jointly indicted may redound to his benefit, still under the statute on this subject the regular judge is not disqualified.

It is insisted that the court should have given the charge asked by the defendant in regard to a conspiracy between certain parties and deceased. There was no evidence to support the charge, in the shape it was worded, and the

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court had given all that was required under the evidence, under the head of self-defense.

The only serious question presented is whether the facts, or any part of the evidence, justified a charge to the effect "that if Stillwell killed Porter with malice, etc., and the defendant was present, and, knowing the unlawful intent of Stillwell, aided, abetted, or encouraged him in the act, that the jury should find him guilty." This is a correct proposition of law: was there a sufficient foundation laid in the evidence to invoke its application? We think so. (The Reporters will give the evidence.)

We have examined each assignment made. Though there are quite a number of interesting questions presented, we have failed to discover such error as will require a reversal of the judgment, except the first discussed in this opinion. The court should have sustained the plea of the defendant to the power and jurisdiction of the special judge to preside in the case.

For this error the judgment is reversed and the cause remanded.

Reversed and remanded.

11	608
37	625

H. O. ROGERS v. THE STATE.

1. **LOST INDICTMENT — SUBSTITUTION.**—The authenticity of a substitute indictment can not be rested on presumption, nor on mere inference from a record-recital that, the original indictment being lost, the court granted leave to substitute it with a copy inspected by the court. The record must affirmatively verify it as a fact that the substitution was actually made.
2. **LAND-FORGERY — EVIDENCE.**—In the trial of appellant for the forgery of a deed purporting to have been signed by one Gritten, it was not error to allow the State to put in evidence, for comparison with the signature alleged to have been forged, certain signatures which purported to be those of Gritten to documents shown to be archives of the General Land Office.

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3. **SAME.**—Nor was it error to admit as evidence for the State an original entry in a record-book of the General Land Office, for the purpose of showing that the land-agency firm of which the defendant was a member made application (anterior to the alleged date of the forgery) for a copy of the original title granted to Gritten. It was not incumbent on the State to confront the defendant with the person who made the original entry upon the record-book. (Hurt, J., dissenting.)
4. **SAME—JURISDICTION.**—The jurisdictional rulings in the case of *Rogers, Ex parte*, 10 Texas Ct. App. 655, reconsidered and maintained,—which rulings assert the amenability in Texas of a party who here consorts with and aids his accomplice to fabricate in another State a deed purporting to convey land within this State.

APPEAL from the District Court of Travis. Tried below before the Hon. A. S. WALKER.

By the minutes of the trial court it appears that an indictment was presented by the grand jury of Travis county on May 23, 1881, against the appellant and H. M. Peck, for forgery. On December 12, 1881, the county attorney filed a written suggestion of the loss of the indictment, and asked leave to substitute it. The next day an entry appears that, "it being shown to the court that the copy submitted by the county attorney is a substantial copy of the original, it is ordered by the court that said leave be granted and said county attorney allowed to substitute said original indictment in this case." The next entry in the transcript is the written "statement" of the county attorney, dated the same day as the preceding order, and alleging that a paper thereto attached and marked exhibit A "is substantially the same as said original indictment which has been lost as aforesaid; wherefore said county attorney asks the court that said exhibit A be received by the court as a substitute for said original indictment." The substitute marked exhibit A bore the clerk's file-mark as of the same date as the county attorney's statement, and no further entry appears with reference to it.

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The substitute indictment charged that H. O. Rogers (the appellant) and H. M. Peck, in said county and State, on August 8, 1874, did "unlawfully, willfully, feloniously, without lawful authority, and with the intent to defraud, falsely make and forge a certain false and forged instrument in writing purporting to be the act of another person, to wit, the act of Edward Gritten, which said false and forged instrument in writing being then and there falsely made by the said Rogers and Peck, without lawful authority and with the intent to defraud on the part of the said Rogers and Peck, in such manner that said false and forged instrument in writing would, if the same were true and genuine, have transferred and affected certain property, to wit, a tract of land in the county of Travis and State of Texas, and which said false and forged instrument in writing did then and there relate to and affect an interest in land in the State of Texas, and which said false and forged instrument in writing purports to be a transfer and conveyance of the land aforesaid from the said Edward Gritten to James Leland Hall, and which said false and forged instrument bears date on the 25th day of January, A. D. 1849, and is in words and figures as follows, to wit."

The substitute indictment then sets out *in hæc verba* the written instrument, and a certificate of acknowledgment thereof which bears date January 25, 1849, and purports to be the official act of John P. Kale, county clerk of Polk county, Texas. At the foot of the written instrument appears "Edward Gritten [seal]" as the signature of the maker, and "John Gardner, Henry Miller" as those of subscribing witnesses. Around the signature "Edward Gritten" is a long rubric,—a characteristic scrawl by which in civil-law countries a signature is identified in like manner as a horse by the brand upon him. The maker of the instrument was described as "Edward Gritten of Polk Co., State of Texas," and it

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purported, in consideration of \$1,000 cash, to convey to "James Leland Hall, of the county of St. Louis and State of Missouri," one league of land in Travis county, described by metes and bounds, but stated to contain twenty-six labors,—a mistake not natural to a man who used a rubric.

The defense filed a plea of former jeopardy, alleging that in March, 1881, the defendant had been put on trial before a jury upon a previous indictment for the forgery of the same instrument set out in the present charge against him. The plea averred fully and specifically the proceedings had upon the former trial; but, for present purposes, they are sufficiently disclosed in the case of *Ex Parte Rogers*, 10 Texas Ct. App. 655. On December 14, 1881, the present cause went to trial on the defendant's pleas of former jeopardy and not guilty. The jury found a verdict of conviction, and assessed defendant's punishment at a term of two years in the penitentiary.

The evidence in this record is prolix, being largely of a circumstantial and complex character, and disclosed by parol and documentary proofs. In so far as it is directly involved in the rulings of this court, it is stated in the opinion. That adduced by the prosecution had for its object, not only the proof of the *corpus delicti*, but the demonstration of a conspiracy by the defendant and others, concerted and partly executed in Travis county, Texas, to manufacture a forged title to a tract of land in said county granted to Edward Gritten by the government of Coahuila and Texas. John Barry Strong, an avowed accomplice and experienced informer on his confederates, was the witness principally relied on to bring home to the defendant a guilty participancy in the fabrication of the instrument set out in the indictment.

After a brief account of himself as a former denizen of Illinois and Missouri, and an incidental allusion to the "dramatic profession" from which he seceded when his

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wardrobe was burned in 1858, J. Barry Strong testified that he came to Austin, Texas, in December, 1873, at the instance of a Kansas City man named Jones, who wrote him that Austin afforded good opportunities in the land business, and who referred him to Martin and Rogers at Austin. On the arrival of witness at Austin he found that the land business of Jones, Martin, Rogers and others was the fabrication of transfers for (unlocated) land certificates remaining in the General Land Office at Austin, and by means of the transfers obtaining and utilizing the certificates. Being advised of witness's advent at Austin, Jones met him at the depot and took him to the domicile of Martin, who was a one-eyed Iowa ex-sheriff. Jones and Martin, and a brother of the latter, were boarding themselves in a house on Pecan street in Austin. Martin's nephew was cooking for them in the old fashioned way with a skillet and oven. At that place the witness was introduced by Jones to the defendant, whom, however, he thought he had previously met at the defendant's office near by. H. M. Peck was with the defendant, and was introduced by him to the witness, who understood that they were "engaged in the land business,—drawing certificates from the Land Office on forged titles." Witness examined some transfers which the defendant had; they were pretty well got up, except, as he remarked to the defendant at the time, they "looked rather fresh for old documents." Defendant talked to witness about the Gritten land and other outstanding titles. It was understood that they were getting up bogus or forged titles to lands, and getting them on record. Peck did not say much. Defendant told witness that Peck was his partner and transacted the business. Witness left Austin in January, 1874. Previous to leaving he had an interview with defendant on an occasion when the latter had just come from the General Land Office, and said he had offered one of his titles and it had

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been refused. He was excited. He said Fisher (the chief clerk of the General Land Office) had told him he ought to let the ink dry on his titles before he attempted to use them, and advised him to be careful or he would get into trouble. Defendant then said he was going to quit the certificate business, and go exclusively into getting up titles to dead lands on which taxes were not paid,—an indication that the owners had abandoned or forgotten the lands and were not likely to detect tamperers with the titles. He proposed that witness should go in with him and Peck, and that they would furnish the data for getting up bogus titles and send the same to witness, who should have the titles made outside of the State. To this the witness agreed, and told them that any kind of title-papers they wanted could be made at Chicago. The Gritten transfer was talked of, and field-notes therefor were to be sent to witness, to enable him to make the title. Witness told them to send the field-notes to him at Dallas to care of English, but he got them and the accompanying letter before he left Dallas. Defendant gave witness certain seals, and also a certificate cut out of the archives of the comptroller's office, a list of notaries, and some blanks which he said were obtained from Ham. (See 4 Texas Ct. App. 645, for the case of *Ham v. State*, and some account of his operations in Texas as a land forger.) Defendant also furnished witness with a certificate of John P. Kale, county clerk of Polk county, Texas, which the defendant said was a genuine certificate taken from the records of the comptroller's office. Defendant gave witness four seals, which he said Ham had got for him, but that they were made wrong. There were also other seals, which were procured by one Maddox,—a man who subsequently testified for the State, and said that he had lived since 1870 in Travis county and DeWitt. The papers and the four seals were delivered by defendant to witness for use in making forgeries when witness should get to Chicago.

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The witness was shown certain seals, and recognized them as the same he had been speaking of. He also identified certain papers as the documents delivered to him by the defendant. It was understood between defendant, witness and Peck, before witness left Austin, that the defendant and Peck were to send him the field-notes of the Gritten league, and witness was to have the bogus deed made at Chicago. A title was to be gotten up for the Gritten league. A title was afterwards got up for it; the title was made in Chicago. Witness identified the deed on which the indictment was based as the "title" of which he was speaking, and said the whole of it was written in Chicago. The name of Gritten was put to the paper by one Thompson; Gritten was not there. The document was got up as a bogus instrument,—a forgery. There is a rubric to the name of Gritten as signed to the forged instrument. Before witness left Austin, the defendant gave to witness a signature which he got by tracing Gritten's signature to the Spanish title in the General Land Office. Defendant gave the signature to witness at Austin for his use in making the forged deed, and it was used in the making of the forged deed at Chicago, as also was the John P. Kale certificate as county clerk of Polk county. A man named Thompson and one Norton made the deed. Thompson is an extensive forger. Witness understood that the names of the witnesses were put to the deed in Chicago by Norton. Witness furnished the data which he had received from the defendant, and so the deed was made after he reached Chicago, in 1874. The deed was made to Hall, who is a "straw man," and at the same time a deed was made from Hall to Samuel Kail, who is a real man and lives at Altona, Illinois. Both deeds were mailed to Peck at Austin. Defendant had told witness at Austin that Peck was "all right," and would carry on the correspondence in the business. After the bogus deeds were received and recorded at Austin,

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they were returned to Chicago. The witness recognized sundry letters and documents as the chirography of the defendant and Peck, and at a later stage of the trial they were admitted in evidence upon expert and circumstantial proof to the same effect. Most of the letters began "Friend John," which was the greeting intended for witness himself. After the bogus deeds were returned to Chicago from Austin, witness retained possession of the documents of which he was speaking until they were taken from him at Chicago by Hugh Chittick, a detective, and when witness next saw them they were in the hands of State's counsel in this case. The foregoing is a recapitulation of the most salient features of Strong's direct testimony, omitting much that is collateral or explanatory.

When this witness J. Barry Strong was first tendered by the State, the defense presented to the court a written suggestion that he was insane, and on that account objected to his competency as a witness, and insisted on the court hearing evidence on the suggestion, with a view to his exclusion. The court declined to take that course, but informed the defendant's counsel that they could elicit the facts in their cross-examination of the witness. The defense reserved exceptions to the action and ruling of the court on this matter, but in their cross-examination of the witness availed themselves of the court's suggestion, and succeeded in developing some curious idiosyncrasies.

The cross-examination first elicited some further particulars of the witness's former career as an actor, and also as a land-operator and litigator in Illinois and Missouri. In the latter State, he said he was admitted to the bar in 1867. Next he stated that he had a theory about all contagions and epidemics. "There are scoundrels who set them off by inoculation. Deval writes of them as early as 1665. They set off yellow fever, cholera,

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small pox and various diseases, male and female kinds. The origin is *in hybrido*. Muzural offspring emanates all these. Every revival of religion in Africa or Asia among the blacks shoots off cholera or yellow fever, and murders twenty-five or thirty thousand people. Those who understand how it is done can set off these complaints at will. I understand the principle, and know just how it is done. I saved Memphis, New Orleans and Texas from yellow fever in 1880 and this year, and prevented the murder of fifteen millions of people. I understand this scoundrelism; I could set it off in seaboard cities and kill millions of people. Professor Grimmer was one of these innoculators. He foretold, and then intended to cause the verification by murdering fifteen millions of people in America; but I prevented it by my articles in Austin and Galveston papers. I know how it is done. I won't tell you how; that is my secret; I am going to print a book on it. The mixture of races is cause of all diseases, even black small pox, now set off in Kansas and Minnesota. But I won't tell you how; that's my business, and you have no right to it."

Dropping his theory for the time being, the witness stated that he was not present when the impression of the seal was put to the certificate of acknowledgment of the forged deed for the Gritten land. He furnished the paper for the deed, and got his brother to write the body of it for the express purpose, and then witness gave it to Norton and Thompson. The entire deed was made in Chicago, and no part of it in Texas. The three seals furnished by Maddox were obtained by witness for use in preparing a book which he proposed to publish on the subject of Land-Sharking. Those seals were not used in making the bogus deeds from Gritten to Hall and from Hall to Kail; they were never used by witness in making forgeries, nor did he ever agree to so use them. Those seals were not procured or kept by witness for any fraud-

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ulent purpose. Witness had sometimes got blank deeds to fill up for the protection of honest people. Filling up or forging these deeds has been so extensive in Chicago that it has there got to be legitimate. Witness had filled up one or two for poor widows and such. Witness never went into the regular forging business. He came to Texas for the purpose of getting information about the burning of the court-house of Liberty county, and the further purpose of going in with Jones, who represented that he had much money, etc. In 1878, witness was brought by Chittick from Chicago to Texas under a requisition and charge of dealing in bogus land certificates, and was kept in jail at Austin eighteen months. He has an agreement with the State's attorney to tell all he knows and be released from all indictments against him. Witness is under no bond, and his expenses are not paid by the State, but he is no pauper nor thief, and can get all he needs and more now. He now owns the telephone for this State. "I had it fixed to me. . . My brother, H. C. Strong, is the patentee for the telephone. I am to be entirely released after testifying in this case, as I believe it is the last one. I have been writing here some on epidemics; am no doctor, but I am only cognizant of the facts of these epidemics, and have published a few articles on epidemics in my paper called 'Telephone,' a copy of which I see in court. They include 'Assassination of Fifteen Millions of People in America,' 'The Eastern World Depopulated,' 'Professor Grimmer Thwarted,' 'Yellow Fever Prevented By Me,' etc.; also a reference to the 22nd Chapter of Numbers to prove what is said in these articles, that is, to the conduct of Phineas." The witness enlarged on this topic, and concluded his testimony by reiterating that every part, letter, figure and character of the Gritten deed, including the witness clause and the certificate of acknowledgment, were made in Chicago, Illinois, and that nothing on or attached to that document

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was of Texas production except the file-mark and certificate of the officer who recorded it. The paper and ink used in its fabrication were obtained in Chicago by the witness.

The State introduced proof that the two deeds of which Strong had testified were recorded by the proper officer of Travis county, in August and September, 1874, at the instance of Peck. Other evidence, mostly of a circumstantial or expert character, was introduced by the State for the purpose of corroborating the accomplice witness Strong. The seals, letters and papers identified by Strong were admitted. Repeated mention or reference to the Gritten "title," as well as to other such "land business," appears in the documents and letters.

The defense read in evidence the depositions of four Missouri lawyers, who testified that they knew John Barry Strong during his residence for many years in Missouri, and knew his general reputation there for truth and veracity. They concurred in pronouncing it bad, and stated that he was not to be believed on oath in matters affecting his interest. The defense also introduced testimony that the defendant, during the summer of 1874, resided at and near Luling in Caldwell county, and was very attentive to the sewing machine business in which he was there engaged.

The State recalled John Barry Strong, in rebuttal to the four Missourians who questioned his reputation, and he disposed of them summarily. "All four of those men who testified about my character are land-thieves. Their reputation is very bad, and they ought not to be believed on their oaths. Any man who will testify against my character is unworthy of belief. They are all lawyers and liars, and they are hostile to me, and are my enemies."

Being convicted as already stated, the defendant moved for a new trial and also in arrest of judgment. Both motions were overruled, and he appeals.

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B. Coopwood and Joe H. Stewart, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

HURT, J. Henry O. Rogers was convicted of forgery. The record informs us of the loss of the original indictment in this case, and that the county attorney filed a written statement, suggesting the loss and asking leave of the court to substitute said indictment, and that the court, upon being satisfied that a copy submitted by the county attorney was correct, ordered that said *leave* be granted, and the county attorney was allowed to substitute said original indictment by the copy then shown and submitted to the court, which was filed by the clerk. Upon this indictment the defendant was tried and convicted. The defendant moved in arrest, and this motion was overruled and the defendant excepted.

The question presented is, was the conviction under this substitution or copy legal? The counsel for defendant insists that it was not, because from the record it appears that all that was done in regard to this matter was to suggest the loss, ask and obtain leave of the court to substitute a certain copy which was submitted to and inspected by the court; but that in fact there was no judgment of the court declaring the fact of substitution.

The record must speak the fact affirmatively that the substitution as proposed by the county attorney was made. It may be urged, however, that there appears from the record enough from which to presume that in fact the substitution was made. If, in fact, the court did not order and adjudge the substitution there was no indictment in the case; hence we cannot indulge in presumptions; the record must speak that fact, not by way of inference, but directly and affirmatively. *Turner v. State*, 7 Texas Ct. App. 596; *Crosswell v. Byrnes*, 9 Johns. 286; *Beardall v. State*, 9 Texas Ct. App. 266.

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The State proved by H. B. DeBray as follows: "I am Spanish clerk and translator in the Land Office of Texas, and am custodian under the commissioner of the Spanish archives of that office. I have in my hands a book containing some of the original Spanish titles. In one of these appears the name of Edward Gritten in three places purporting to be his signature. These signatures appear to the application of Edward Gritten to become a colonist under the Mexican government; the second to his application for the grant of a league and labor of land as a colonist; and the third to his application for an augmentation of one-fourth of a league. (These three signatures are handed over to the jury and exhibited to them, to compare with the signature to the deed alleged to be forged.) I have an entry here in the book of entries of work. Entry: On 20th November, 1873, application was made to the Land Office by Weller and Rogers for translation of title to the Gritten league of land in Travis county and quarter of league in Bastrop county. The books show application for translated copies, and this book is one of the Land Office records. The rule of the office is, an application is made for the copy, and after it is made it is handed to the receiving clerk, who delivers it on payment of fees. The signatures referred to of Edward Gritten appeared to be written by the same person, were all well written, and had attached an extensive rubric or flourish of pen at end of each."

On cross-examination this witness DeBray testified as follows: "I only testify what is in the books. They are records of the office and show that application was made." On re-examination by the State, this witness testified: "The book is a memorandum of original entries. I think the handwriting is Mr. Goldbeck's."

Counsel for the defendant objected to this evidence: 1st, because the same is incompetent and irrelevant; 2d, because the person who made such entry has not been

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brought into court, to testify thereto, and has not confronted this defendant according to law." Which objections were heard by the court and overruled, and the defendant excepted.

Was this evidence competent? A majority of this court hold that it is, upon this principle, or rule of law: The rule that the prisoner shall be confronted with the witnesses against him does not preclude such documentary evidence, to establish collateral facts, as would be admissible under the rules of the common law. *U. S. v. Bennie*, Baldwin, 240; *U. S. v. Little*, 2 Wash. C. C. 205; *U. S. v. Ortega*, 4 Wash. C. C. 531; Cooley's Const. Lim. 3d ed. p. 318, and note; also 1 Bish. Crim. Proc. secs. 1131, 1132, 1133.

The writer is not prepared to assent to the conclusion that this evidence is competent or admissible. Since the destruction of the library at this place, we have not been able to examine, as we should like, the subject under the light of authorities; we are not, therefore, prepared to give our reasons at this time. There is no division on the relevancy of the fact, if shown in the proper manner, that defendant procured the translation, etc. The point of difference is the manner of making the proof.

The forgery being made without the State, appellant's counsel argues with great force and ability that defendant, though he may have acted with those engaged, and have furnished the necessary information to consummate the forgery, and though every act of defendant was done in Travis county, cannot be tried and convicted of the forgery in this State, and that proof that the forgery took place in another State does not support the allegation that it occurred in Travis county.

The first question presented, to wit, that the defendant cannot be tried and convicted in this State, is treated at great length in *Ex parte H. O. Rogers*, 10 Texas Ct. App. 655.

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The second point, that "proof of the forgery in another State fails to support the allegation that it was made in Travis county," we think is involved in the first; and if that has been properly decided against the appellant the second must be, especially when all of the acts of defendant were done in Travis county.

There are quite a number of assignments made by the appellant which to consider *seriatim* would require time that would not be profitable; the questions presented having been exhaustively discussed in the case of *Ex parte H. O. Rogers v. State*, and several other cases of the same school.

The record failing to show that the indictment was in fact substituted, the court should have sustained the motion in arrest. The judgment is reversed and the cause remanded.

Reversed and remanded.

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THOMAS COHEA v. THE STATE.

1. ACCOMPLICE TESTIMONY — CORROBORATION.— It is not necessary that the other evidence shall corroborate that of the accomplice as to any particular statement made by him; but, whatever the amount of the corroborative evidence, it does not avail unless it tends to connect the defendant with the offense committed.
2. SAME — BURGLARY — CHARGE OF THE COURT.— Appellant was convicted of burglary on an indictment which charged him as an accomplice to the crime, alleging that, though not present at its commission, he advised and encouraged the principal offender before it was done, and furnished him aid in its perpetration. The chief evidence of the guilt of the principal offender and the complicity of the defendant on trial was the testimony of one B., who was a *particeps criminis*. The defense asked the court to instruct the jury that "corroborating testimony tending to connect the principal with the offense will not be sufficient to convict the defendant as an accomplice." *Held*, that this was a correct principle of law and not a charge on the weight of the evidence; and.

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being applicable to issues raised by the evidence, and not comprised in the main charge of the court, the trial court erred in refusing to give it to the jury.

3. FACT CASE.—See evidence *held* insufficient to corroborate such parts of an accomplice's testimony as tended to incriminate the defendant.

APPEAL from the District Court of Gonzales. Tried below before the Hon. EVERETT LEWIS.

The indictment was presented on June 22, 1881, and, after alleging that Cal Cohea, on April 23, 1881, burglariously entered the dwelling house of George W. Carraway in the night-time, without the consent of said owner and with the intent to steal, take and carry away a gun and a sack of flour, it proceeded to charge that Thomas Cohea, the appellant, did "on the said 23d day of April, A. D. 1881, and prior to the commission of the said offense of burglary as above charged against Cal Cohea, unlawfully, willfully, fraudulently and feloniously advise and encourage the said Cal Cohea to commit the said offense of burglary as above charged, he the said Thomas Cohea not being present at said burglary; and that he the said Thomas Cohea did then and there unlawfully, fraudulently and feloniously furnish a mare, prior to the commission of said burglary by the said Cal Cohea, for the purpose of assisting the said Cal Cohea in the execution of said burglary as charged herein; against," etc. The case came to trial in January, 1882, when appellant was found guilty by a jury, and his punishment assessed at a term of two years in the penitentiary.

G. W. Carraway, the first witness for the State, testified that in April, 1881, he lived on the Sandies creek in Gonzales county, and on the 23d of that month went to the town of Gonzales, and returned home the next day and found that during his absence his dwelling and smoke-house had been entered and sundry articles taken therefrom. His wife and the rest of his family, it seems,

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were also absent from home when he was. A gun worth ten dollars, a sack of flour worth two dollars and a half, and some other articles were missing from his dwelling; and ten sides of bacon worth twenty-four dollars from his smoke-house. The dwelling and smoke-house were only latched, not locked, during the absence of the witness. Witness found the flour, a box of sugar, a jug of molasses, and some pickles hidden in a pasture which belonged to George Cohea, and in a corner of which the defendant lived. The bacon was found in the rear of James Trafton's pasture, who lived about a mile and a half from witness, and about two miles from the defendant. The premises were broken into on Saturday night, and, about nine o'clock the next Monday morning, Alfred Burton told witness about it. Defendant and Cal Cohea had been arrested before Burton told witness about the matter. Witness and Vosburg went to Leesville about midnight of the Sunday previous to the arrest, and witness there made complaint against Cal Cohea and Alfred Burton for breaking into his house and stealing his property. Witness did not at that time charge Tom Cohea, the defendant, with the burglary or the theft. Vosburg and witness got a warrant for the arrest of Cal Cohea, and a subpoena for Burton as a witness. After the arrest of the two Coheas, witness and the arresting party went with Burton in search of the stolen goods, and found them (except the gun) as already stated. After the breaking into the premises, witness did not see either Cal Cohea or Burton until after he got the legal process for them, but he could give no reason for his taking a subpoena for Burton instead of a warrant. Witness denied that he had told William Gilbert that he, witness, knew that his house would be broken into and robbed, two weeks before it was done. What he did tell Gilbert was to the effect that a man had told him, the witness, after the house was broken into, that he, the man, knew

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that it was going to be done, two weeks before it was broken into. Burton told witness that Cal Cohea had carried off the gun, but it had never been found. Neither the defendant nor any one else had witness's consent to break into his house.

Alfred Burton, for the State, testified that about ten days before Carraway's house was broken into, Jim Trafton proposed to him to break into somebody's house and steal some bacon, and take it to town, sell it and get some money. Jim Trafton proposed that they should break into George Carraway's house, saying that he would not break into Henry Carraway's, nor steal from him. His plan was to hide the bacon on the side of the road leading to the town of Gonzales, put it in a wagon and pretend they were going to the river on a fishing excursion, and then take the bacon to Gonzales and sell it. He said they would get Henry Carraway's wagon to haul it off in. In the early part of the week in which George Carraway's house was broken into, the witness, defendant and Cal Cohea were working together in a field rented by defendant from old man Trafton, when the defendant proposed that they should find out whether George Carraway or somebody else would be from home the next Saturday night, and they would go and get some bacon and hide it behind Jim Trafton's field, and would the same day borrow Henry Carraway's wagon, pretend they were going fishing, go by and get the bacon, carry it to town and sell it. After that, Mrs. Elijah Trafton told witness, defendant and Cal Cohea that George Carraway was going to town on Saturday night. Cal Cohea, witness and the defendant then agreed to break George Carraway's house. Cal Cohea and witness were to do the breaking and stealing, and Tom Cohea, the defendant, was to furnish a mare and get a third of the proceeds. On Saturday evening witness went to defendant's house, lay down about sunset and went to sleep. Cal Cohea was to wake wit-

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ness up. The defendant had told witness during that day to come to his house that night and lie down and go to sleep, as he didn't want his wife to know anything about the raid. Witness rode the defendant's mare, and Cal Cohea rode his own horse. They started about eight o'clock, and on their way Cal Cohea proposed that if they should find sixty dollars in money they would steal nothing else. They found Carraway's doors all latched, and first opened and went through the dwelling, broke open trunks, and carried out to the gallery such things as they wanted. Then they went into the smoke-house and each took five sides of bacon, and tied three of them on one side and two on the other of their animals, using Carraway's clothes-line for the purpose. They tied the sides across their saddles and rode behind the saddles, and thus took them behind Jim Trafton's field, and piled them up outside the fence, and covered them with bark and brush. Defendant had told them to carry the bacon there. After hiding the bacon they went down on Cottonwood creek to Mr. Kinney's, to steal some money from him, but, finding him at home, they desisted. From Kinney's they came back about a quarter of a mile to another house, but found its occupant also at home, and again desisted. From there they returned to George Carraway's and took the things they had left there on the gallery, consisting of a sack of flour, a box of sugar, a gun, a jar of pickles, and other articles. These things they took and put inside of George Cohea's pasture as defendant had told them to do, at a place about two hundred yards from the defendant's house. Defendant and his wife were asleep when witness and Cal Cohea started from defendant's early in the night, and were asleep when they got back there a little before day. After putting their horses in the pasture they lay down and slept until day and then got up. After breakfast they went by Elijah Trafton's place, where witness was staying, and there he changed his

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clothes, and then they went down to Liberty church, to attend divine service. Witness could not say whether he and Cal Cohea got their clothes greased by the bacon, or not, but they wiped their saddles with their saddle-blankets. Some grease, however, remained on the saddle-skirts and sweat leathers, which they could not wipe off. Witness caught the defendant's mare after the latter went to bed. The defendant and Cal Cohea were to carry the bacon to town. Witness acknowledged that he swore at the examining court that Jim Trafton was to carry the bacon to town. Cal Cohea and witness did not know that George Carraway was away from home until they got to his place; but Mrs. E. Trafton had told the witness that Carraway was going to town. At the examining trial witness swore that Mrs. Trafton told him that Carraway was away from home. In the written testimony at the examining trial it appears that this witness there swore that he "knew that G. W. Carraway was absent from home" before he started on the raid.

G. W. Cohea, for the State, testified that the defendant was his brother and lived in the corner of his, witness's, pasture. On the Sunday morning after Carraway's premises were broken into, witness passed the defendant's house, and about a hundred and fifty yards therefrom he saw a sack of flour stuck in a crack of the pasture fence, and a gallon jug and a box near the flour. As witness passed back, the defendant was standing in his door and witness asked him about the things. Defendant replied that he knew nothing about them. Alfred Burton was then at the defendant's, but witness did not see Cal Cohea there.

W. Vosburg, for the State, testified that the morning after he and George Carraway got the warrant for Cal Cohea and the subpoena for Alfred Burton, witness got a crowd of men and took charge of the defendant and Cal Cohea, whom they found at work in a field which be-

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longed to old man Trafton. Directly afterwards witness found Alfred Burton outside of the field, and took charge of him as a witness. Burton proposed that if witness would go with him he would show where the stolen property was, and stated that he and Cal Cohea robbed the house. A few minutes afterwards, and after some further conversation, Burton said that the defendant furnished his mare for him, Burton, to ride, and was to have a third of what was got. Witness and his crowd were taken by Burton to where the things were concealed in George Cohea's pasture.

Three other witnesses testified for the State in corroboration of so much of Burton's testimony as related to the greasy condition of the saddles ridden by him and Cal Cohea on their raid. Nothing in their testimony had any relation to the inculcation of the defendant.

J. J. Carpenter, for the defense, testified that he was one of the party who arrested the Coheas. "When W. Vosburg," said the witness, "came back to the party after interviewing Alfred Burton, he stated to us he had found out who did the robbing of Carraway's house. Some one asked who, and he said Burton told him that himself, Burton and Cal Cohea did it. And about fifteen minutes afterwards, and after a second conversation between Vosburg and Burton, Vosburg said that Burton in the second conversation implicated defendant. This was Monday morning, about nine or ten o'clock in the morning."

Wm. Cohea, testifying for the defense, made the same statement as the preceding witness Carpenter.

W. Gilbert, for the defense, testified that in August, 1881, George Carraway told him that he, Carraway, knew, two weeks before his house was broken, that it was going to be broken.

James Trafton, for the defense, testified that at no time did he ever propose to Alfred Burton to break anybody's house or get anybody's bacon. A week or ten

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days before the robbery of Carraway's house, Burton came and proposed to witness to get some bacon, and mentioned George Carraway's as a good place to get it. Witness told Vosburg and Carraway of this on Sunday evening succeeding the night the latter's house was robbed, but witness made no mention of the defendant, and never said that defendant had anything to do with it. Burton said he wanted to steal the bacon to pay the defendant a debt of seven dollars and a half. During the conversation Burton did the talking, and witness said but little.

It is disclosed in the evidence that there had already been a trial and acquittal of Cal Cohea upon an indictment which charged him with the burglary.

On the subject of accomplice testimony the charge of the court was as follows:

"The witness A. Burton has testified for the State in this cause, and his testimony is before the jury for their consideration, and to be weighed by them. The jury are instructed that, according to his said testimony, he was guilty as a principal offender, and the jury cannot convict the defendant on his testimony alone, unless corroborated by other evidence tending to connect the defendant with the offense committed. In other words, there should be other evidence tending to show, not only that the burglary was committed as charged, but connecting Thomas Cohea with it. . . . With the restrictions hereinbefore made as to the testimony of an accomplice, the law prescribes no rule for the kind or amount of testimony, other than it must be sufficient to fully satisfy the jury of the existence of every fact necessary to constitute the guilt of the accused, beyond a reasonable doubt."

Fly & Davidson, for the appellant.

H. Chilton, Assistant Attorney General, for the State.

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HURT, J. This appellant was convicted as an accomplice to burglary with intent to steal. The witness Burton was one of the actual participators in the burglary and theft. This witness swears to facts amply sufficient to convict the appellant, but under the Code he is an accomplice and must be corroborated. We have given the statement of facts the closest examination and find no fact or circumstance, sworn to by any other witness, tending to connect the defendant with the offense. (The Reporters will insert the evidence.)

While it is true that a great many facts sworn to by the accomplice were corroborated by the evidence of the other witnesses, there is not the slightest tendency in these facts to *connect the defendant with the crime*. As we have before held, the evidence of the other witnesses need not corroborate some particular fact testified to by the accomplice, but it must tend to establish the *guilt* of the defendant. The accomplice may swear to any number of facts, and other witnesses may corroborate him in regard to these facts, and yet this character of corroboration would not be such as is required by our Code.

The defendant was charged as an accomplice to one Cal Cohea. To convict the defendant, it was necessary to establish the guilt of the principal. To effect this, there was quite an array of facts adduced on the trial.

The counsel for defendant requested the trial judge to charge the jury as follows: "Corroborating testimony, tending to connect the principal, Cal Cohea, with the offense, will not be sufficient to convict the defendant as an accomplice. The corroboration must point to the defendant and connect him directly with the alleged offense."

This charge was refused because, as the judge states, "Objectionable as a charge on the weight of evidence, and I have charged on the subject." We do not find in the charge of the court the subject-matter contained in the first sentence of the requested charge alluded to at all.

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Evidently it was not upon the weight of evidence. It enunciated a correct principle of law which should have been applied in this case, in view of the nature of the offense charged and the proof required and introduced to sustain the charge? It was incumbent upon the State to show the guilt of the principal, Cal Cohea. Evidence which was competent for this purpose may not have been admissible against the defendant. The proof of the guilt of the principal, though absolutely necessary, did not tend to show the guilt of defendant. Therefore, corroboration of the witness Burton as to the guilt of the principal was not a corroboration which tended to connect the defendant with the commission of the offense.

In this character of prosecutions, the guilt of the principal and that of the accomplice (the defendant) were in issue. To support the issue of the guilt of the principal, evidence is frequently received which would not tend to criminate the accomplice, but clearly competent to establish the guilt of the principal; hence the necessity of the trial judge informing the jury of the purposes of the evidence. 10 Texas Ct. App. 131.

We are of the opinion that the witness Burton was not corroborated, and that the court erred in refusing the charge asked by the defendant's counsel; and that therefore the judgment should be reversed. The judgment is reversed and the cause remanded.

Reversed and remanded.

H. L. DREYER v. THE STATE.

1. JURY LAW — DISQUALIFYING OPINION OF JUROR. — On the *voir dire* of a juror he stated that he heard the evidence in the previous trial of one O. for the same offense charged against the appellant, and had formed the opinion that O. was guilty, but had formed no opinion as to the guilt or innocence of appellant. The defense challenged the

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juror for cause, but the trial court overruled the challenge, and, the peremptory challenges of the defense being exhausted, the juror was put on the panel which convicted the appellant. The defense reserved a bill of exceptions, but it does not manifest that the evidence in O.'s case was the same as that in the appellant's, nor disclose how the appellant's amenability was affected by the evidence adduced against O. *Held*, that this state of the record fails to show that the juror entertained a disqualifying opinion in this case, or that the trial court erred in impaneling him. *But held further*, that the better practice is to discharge a juror whose impartiality is questionable.

2. MARKS AND BRANDS.—The Revised Statutes, in article 4556, require every owner of cattle, hogs, sheep, or goats to have a distinctive ear-mark and brand, and to have the same recorded; and article 4561 provides that unrecorded brands shall not be evidence of the ownership of cattle, horses, or mules. *Held*, that this latter provision does not apply to unrecorded marks. *Quære*, whether it uses the word *cattle* in a sense to comprehend sheep.
3. EVIDENCE—PRACTICE.—The prosecuting attorney was permitted, over objection by the defense, to testify that while the defendant was on bail, and during the previous trial of one O. for the same theft, he (the prosecuting attorney), with the view of using the present defendant as a witness, inquired of him whether the person who was on trial at the time was O., and the defendant replied that said person was not O., but was one M., whom he knew; and the defendant was consequently not used as a witness against O. The defense objected that the defendant was in duress and uncautioned when he made the reply to the witness, and that the latter could not fairly reproduce the reply to the prejudice of the defendant. *Held*, that the objections were untenable, and, under the circumstances, the testimony was not improper.
4. THEFT—CHARGE OF THE COURT ON THE DEFENSE OF BONA FIDE PURCHASE.—The jury were instructed for acquittal in case the defendant in good faith purchased the stolen animals, but were further instructed that a fraudulent sale was no defense. *Held*, that the jury may have been misled by this latter instruction. See the opinion *in extenso* on the point, and also in elucidation of the opinion in *Shoefercater v. State*, 5 Texas Ct. App. 207.
5. SAME.—It is error in a trial for theft to so charge the jury as to permit the conviction of the accused without proof of guilty knowledge or intent.
6. CHARGE OF COURT ON CIRCUMSTANTIAL EVIDENCE.—When the inculpatory evidence is circumstantial it is error to refuse a requested instruction which correctly expounds the cogency requisite in that character of proof.

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7. RECEIVING STOLEN PROPERTY — VERDICT.— If, at a trial on an indictment for theft, the conviction depends on evidence which proves the receipt and concealment of stolen property, knowing it to have been stolen, correct practice requires that the verdict should show that the conviction was for the receiving and concealment.

APPEAL from the District Court of Nueces. Tried below before the Hon. JOHN C. RUSSELL.

Theft of ninety-two sheep, the property of William Cody, was the offense charged in the indictment. The alleged date of the theft was January 13, 1881. The jury found the defendant "guilty as charged in the indictment," and assessed his punishment at a term of two years in the penitentiary.

William Cody, for the State, testified that he lived on the Oso creek in Nueces county. In January, 1881, he lost ninety-two head of his sheep; which were taken without his consent, but by whom he did not know. He recovered some of them from the defendant, who also acknowledged that he had killed four of them, and gave witness a due bill in payment for those four. Witness had come to the town of Corpus Christi, where the defendant lived, but before he got there his son had by legal process sequestered the sheep which were recovered from the defendant. The sheep had been brought to the town of Corpus Christi from the Oso, a distance of about fourteen miles, after a rain had fallen. Witness trailed the route they had been driven, but could not find where the trail came into town. Witness did not see the defendant in possession of any of the sheep, but the defendant told him he got the sheep from Antonio Olivarez, and showed a bill of sale to witness. The sheep lost by witness were in three different ear-marks, and the witness was permitted, over objection by the defense, to delineate the three ear-marks to the jury,—the objections of the defense being that the law required the marks to be recorded, and un-

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less recorded they were not evidence of ownership, and the record of them was the necessary evidence. The defense reserved exceptions to the admission of this parol proof of the ear-marks.

Proceeding with his testimony, the witness stated that the sheep he recovered were not then in the ear-marks he had described; when he got them back their ear-marks had been changed, and to prevent bleeding the ears had been burned, which also gave the marks the appearance of having been cut for a considerable time. The witness was shown a bill of sale, dated January 13, 1881, purporting to be made by Antonio Olivarez to the defendant, and for \$100 to convey ninety-two sheep which, in various numbers, were in eight different ear-marks delineated in the bill of sale. Witness stated that he recovered sheep which were in three of the eight ear-marks delineated in the sale-bill, but recovered none in the other five. At the foot of the bill of sale appears the certificate of its acknowledgment by the maker, Olivarez, before Joseph Wright, inspector of hides and animals of Nueces county, by Benjamin Gravett, deputy. This certificate bears the same date as the bill of sale. The witness stated that the defendant was a butcher, and bought sheep for his butchering business.

On the cross-examination of this witness he stated that it was in January, 1881, but earlier than the 13th of that month, when he lost his sheep. Witness penned his sheep at night, but could not state whether the sheep he lost were penned the night they were lost; but from the tracks he thought they were taken out of the pens. He recovered those he got before he missed them, and before he found the tracks. He learned on the Oso that the defendant had been buying sheep in that range, and told his son, when the latter went to Corpus Christi, to take a look at the defendant's sheep. Witness knew that none of his neighbors had sold any sheep. When the sheep were lost

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the witness had a Mexican herder who had charge of them night and day, but who did not live where they were usually penned. Witness did not believe, though it was possible, that his sheep had got lost by straying off. He did not ascertain that those he recovered were his sheep until they were caught and their ears examined. Defendant, in his talk with witness, said he had bought and paid for the sheep in good faith, and that he knew nothing at all about the change of their marks. Witness was apprised that Valentine Martinez had recently been convicted for stealing the identical sheep involved in the present case.

On his re-direct examination the witness stated that he did not know that defendant had any of his sheep until his son went to Corpus Christi. A brother of the defendant had told witness that the defendant had bought muttons at a little over a dollar a head, and it occurred to witness that they might be his sheep. Since the sheep were lost the witness had discharged the herder he had spoken of, and could not say what had become of him.

Edward Cody, son of the preceding witness, testifying for the State, said that on Sunday, January 16, 1881, he came to Corpus Christi and called by the defendant's place, and there found some sheep which he recognized as his father's, though their ear-marks had been changed. Witness asked the defendant about them, and he said they were a lot of sheep he had bought from Antonio Olivarez on the preceding Thursday, and he showed witness a bill of sale, and said that witness could get the sheep by making oath to them. Witness got out a writ of sequestration for the sheep, and had constable Benson to take charge of them. Cross-examined the witness stated that the defendant spoke to him in a friendly manner about the sheep, and wanted him to make oath to them in order that he, the defendant, could get out a warrant for the person who had sold them to him.

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B. Gravett, for the State, testified that in January, 1881, he was deputy inspector of hides and animals, and on the 13th of that month the defendant got him to go out to his, the defendant's, place to inspect some animals. On the way there the defendant said, "A fellow drove a bunch of sheep to my place last night and I don't know whether they are all right or not, and I want you to inspect them." Witness replied that he would not inspect sheep, and had no authority to inspect sheep; to which the defendant responded, "I told the man that you would inspect them, and that it would cost five cents a head and fifty cents for a bill of sale." Defendant asked witness if he would not proceed and make out a bill of sale; and witness agreed to do so. They went on, but the man was not at defendant's place, and the witness returned to town. Soon, however, the defendant came and told witness that the man was then waiting at the former's place, and witness again went out there with the defendant. Witness saw the Mexican who had sold the sheep, and saw the sheep in a pen. Defendant had a paper in his hands, and said there were the ear-marks. Witness had his assistant to catch the sheep and take down their ear-marks. Then witness copied the ear-marks into the bill of sale, and asked the Mexican what his name was. The Mexican said his name was Antonio Olivarez, and, in reply to an inquiry by witness, said he was from the Calaveras. Witness asked him if he could write, and, replying that he could, he took the bill of sale and signed it with the name he had given. He is the same man who, under the name of Valentine Martinez, had very recently been convicted of stealing the sheep in question. Witness had never seen him before the occasion he had been testifying about, but recognized him after that, and he was arrested. After the arrest of the man the defendant said to witness, "I have heard that you have got the sheep-man that stole Cody's sheep," and witness replied, "Yes, and it ought to

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be a feather in your cap, to relieve you." Then the defendant said: "If it is the man I have been told it is, I ought to have known the man at the time." The bill of sale was shown to witness, and he identified it and his certificate of its acknowledgment.

W. J. Robertson, for the State, testified that he was a justice of the peace of Nueces county, and that, on January 17, 1881, the defendant made an affidavit before witness against Antonio Olivarez, who, however, was not arrested under witness's warrant. Defendant got the witness to appoint a Mexican a special constable to look for Olivarez. The man kept the warrant eight or ten days and then returned it "not found." Whether he had made any effort to find Olivarez, the witness could not say. Nothing further was done in the case. The affidavit referred to was identified by the witness and admitted in evidence. It charged Antonio Olivarez with the theft of ninety-two sheep, the property of William Cody, on January 13, 1881.

W. E. Cummings, the district attorney, became a witness for the State, and, over objections by the defense, testified as follows: "The other day, upon the trial of Valentine Martinez *alias* Antonio Olivarez, I approached defendant with a view of making him a witness in that case. He was under bond at the time. I asked H. L. Dreyer, the defendant, if the man then on trial was Antonio Olivarez. Said H. L. Dreyer answered 'No, that is not Antonio Olivarez, that is Valentine Martinez; I know him.' Thus knowing what he would swear, I did not put him on the stand as a State's witness."

Before testifying in the case himself, the district attorney had unsuccessfully endeavored to prove by other witnesses that Martinez *alias* Olivarez was personally known to Dreyer, the defendant. It was in proof that eighty-six of Cody's sheep were recovered from the defendant. They were worth, in Cody's opinion, an average of two dollars each.

Argument for the appellant.

Counsel for the defense announced that they desired to introduce no proof except the bill of sale, which was already in evidence.

All other material facts are disclosed in the opinion of this court.

McCampbell & Givens, and *Welsh & Givens*, for the appellant. The trial court looked to the technical construction of the jury law rather than the enforcement of the right of defendant to have an impartial jury, as guaranteed him by the Bill of Rights, and thus defendant was forced to accept a jurymen with settled convictions as to the bearing of the evidence to be adduced. We believe that there are many questions arising outside of the mere statutory disqualifications and causes for challenge, brought into existence by the imperative right of an accused to have an impartial jury. From the issue formed by the district attorney on this question in this case, it will be seen that it is believed by the prosecutor that defendant's peremptory challenges are to be used by him only in the order the names of jurymen appear upon the lists given respectively to the State and defendant.

The result of this rule would be to give an accused person a biased jury, should he depart from the strict numerical order in which he passed upon the jurymen in exercising his peremptory challenges.

Surely, in the gravity of a criminal cause the law will not be made the creature of injustice by such little things. In illustration of the evil that might result from the enforcement of a rule of using peremptory challenges, as urged by the prosecution, and approved in this case by the trial court, we will suppose a venire of twenty-four persons to be passed upon: Upon their *voir dire* ten of them answer that they sat upon the trial of a cause involving the same questions of fact. They are challenged for cause, and the trial court overrules the challenges. Now comes the rule of the prosecution as in this case,

Argument for the appellant.

and demands that defendant exhaust his peremptory challenges upon the ten jurors with the opinion formed at a former trial of the same facts. Of course defendant has no peremptory challenges left for the other fourteen jurors, and the strength, meaning and justice of the compact between the citizen and State of his right to an impartial jury is frittered away by technical construction.

We urge that the trial court had not the legal right or power to dictate to the defendant, on trial for his liberty, in what order he shall use his peremptory challenges; whether he shall commence at the bottom of his list, or the top, or in the middle of it. Appellant having exhausted his peremptory challenges upon ten of the most objectionable jurors on his list, was no reason why Charles Meuly, with a formed opinion as to the facts to come before him, should be permitted to sit, after challenge for cause; and the responsibility rests upon the trial court in a too zealous effort to serve the State at the sacrifice of one of the dearest rights of the citizen.

Clearly, appellant was not tried by twelve impartial jurors, but by eleven unprejudiced men, and one who had formed opinion upon the evidence at a former trial, and could not be impartial.

The court erred in permitting William Cody to testify, over the objections of defendant, as to the ear-mark of his sheep without producing the record of said ear-mark, or a certified copy thereof. Arts. 4556 and 4561, Rev. Stat.; art. 726, Code Crim. Proc.; *Hutto v. State*, 7 Texas Ct. App. 44; *Allen v. State*, 42 Texas, 518.

A careful examination of the record of this case will exhibit an entire absence of testimony tending to connect defendant with a taking of the sheep alleged to have been stolen. To the contrary, it is clearly shown by the evidence of State witnesses that defendant, pursuing his trade of a butcher, sought to surround his purchase of

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the sheep with every safeguard of the law. He purchased the sheep in broad daylight and in the presence of the inspector of hides and animals of Nueces county, and his bill of sale was made out by said inspector and acknowledged before him by the person selling.

In the subsequent possession of them, defendant's actions were those of a person having, as he believed, a fair and honest title, and his conduct, on learning that the property had been taken from Cody's possession, was all that could be exacted from fair dealing and a desire to respect the rights of others.

If the defendant received the property knowing it to have been stolen, the verdict of the jury surely did not so find, and in the absence of such a verdict, one finding defendant guilty of theft, without a scintilla of evidence to support the charge, will not, we trust, be sustained.

H. Chilton, Assistant Attorney General, for the State.

WHITE, P. J. One Antonio Olivarez had been separately indicted, tried and convicted of the same identical charge contained in the indictment against this defendant. When this case was called subsequently, one of the jurors herein summoned, to wit, Charles Meuley, when examined as to his qualifications stated on his *voir dire* that he was present and heard the testimony on the trial of Olivarez, and had formed the opinion that Olivarez was guilty as found by the jury. He stated, however, that he had formed no opinion as to the guilt or innocence of this defendant from having heard said testimony. Defendant's challenge for cause, based upon the fact above stated, was overruled by the court, and, his peremptory challenges being exhausted, the juror was impaneled and sat upon and tried the case.

We are not prepared to say that the court erred. It is not at all unreasonable that the juror might have heard

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all the evidence in the other case and been convinced of the guilt of Olivarez, and yet have formed no opinion whatsoever as to the guilt or innocence of this defendant. We can easily imagine how such might be the case, where one party to a transaction is principal and the other an accomplice, and where one was the party stealing and the other the receiver of the stolen goods, knowing them to have been stolen. Before we would be warranted in holding the juror incompetent or necessarily partial on account of an established opinion, for the reason named, the bill of exceptions should show that the evidence, and also the liability of the parties under it, would necessarily be the same. Still, in this country where fair and impartial jurors can be had so readily, there is really no reason why questions of this character should arise, and in all cases where there is a possibility for serious doubt as to the impartiality of a juror, from whatever cause, the court, in the exercise of the discretion conferred upon it, should promptly discharge him. Code Crim. Proc. art. 636, subdiv. 13.

Objection was made by defendant to proof of the three *ear-marks* of the alleged owner of the sheep, because the best and only evidence of the ear-marks of animals would be the record or a certified copy thereof. In support of this position, arts. 4556 and 4561, Rev. Stats., are relied upon. By the former it is true that owners of stock, including sheep, are required to have an ear-mark and a brand, and to have the same recorded. The latter article provides that "no *brands* except such as are recorded by the officers named in this chapter shall be recognized in law as any evidence of ownership of *the cattle, horses or mules* upon which the same may be used." If this latter article applied at all to *sheep*,— which are not mentioned in it,— it does not apply to *marks*, but to *brands* only. *Johnson v. State*, 1 Texas Ct. App. 333. The court did not err in overruling the objection to the evidence.

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Nor was it error to permit the district attorney to testify to a statement made by defendant to him, on the trial of Olivarez, to the effect that, "I asked the defendant H. L. Dreyer if the man then on trial was Antonio Olivarez? Dreyer said 'no, that is not Antonio Olivarez; that is Valentine Martinez. I know him.'" It is shown by the bill of exceptions that defendant H. L. Dreyer was not in charge of any officer at this time, but was voluntarily in the court house, being simply under bond. And the statement of the district attorney as to his motives in approaching defendant and asking him the question fully exonerates him from the imputation of unfairness or deceit in the matter; his object as stated being to make a witness of Dreyer in case he identified Martinez as the party who claimed to be Olivarez when he executed the bill of sale.

The remaining bill of exception points out two errors in reference to the charge, which we think are fatal to the validity of the judgment. In the 7th paragraph of the general charge the jury were instructed as follows, viz.: "If from the evidence you believe that the defendant did buy the animals described in the indictment from another in good faith, with or without a bill of sale, he is not guilty; but if you believe from all the circumstances surrounding the transaction in proof that the *sale* was not made in good faith but only to cover a fraudulent taking, then such *sale* would be no defense." Under this instruction the jury would have been fully warranted in finding the "*sale*" as made by Olivarez fraudulent so far as he, Olivarez, was concerned, and, having so found, would not give defendant, even though they might have believed him an innocent *purchaser*, the benefit of it in his defense. The *sale* might have been a base and fraudulent deceit on the part of Olivarez, and yet the defendant have been an innocent and honest *purchaser*. "In a trial for theft it is error to so charge the jury as to permit the

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conviction of the accused without proof of guilty knowledge or intent." *Logan v. State*, 2 Texas Ct. App. 408.

Almost every day's experience teaches us that honest, upright, innocent men are made the victims of false, fraudulent and dishonest sales,—that they are the dupes of thieves and villains. But because they have been victimized is no reason why they should be held criminal, or be deprived of the right to show that fact. We are aware that this particular charge which we are commenting upon is copied *verbatim* from a charge given in the case of *Shoefercater v. State*, 5 Texas Ct. App. 207, and which was moreover highly commended for its fairness by this court. A mature consideration of the language leads us to the conclusion that a proper construction was not given it in that case, for the very language used by Presiding Judge Ector shows that he construed the word "sale" to mean and be synonymous with "trade," and to embrace within it the acts of both parties, and not the act of the vendor alone; for he says, "It was a proper question to be left to the jury to determine, whether the defendant *traded with Arthur* for the oxen in good faith, or whether the transaction *between them* was only a device to cover a fraudulent taking on their part." Evidently he is speaking of the joint acts of the parties in the sale and purchase. If his construction had been correct, there can be no doubt of the correctness of the views expressed. We do not think the construction correct. The word "sale" unquestionably means the act of the vendor, and, if the jury so understood and acted upon it, they were manifestly misled to the injury of the defendant. The learned judge presiding below is not to blame for having fallen into this error.

Another error complained of is that the charge omits to instruct the jury upon the law of circumstantial evidence, and that the court refused a requested instruction upon this branch of the case. This error is well assigned,

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and the requested instruction should have been given. *Hunt v. State*, 7 Texas Ct. App. 212; *Smith v. State*, 7 Texas Ct. App. 382; *Struckman v. State*, 7 Texas Ct. App. 581.

There is another matter to which we would call attention, and it is this: Whenever, under an ordinary indictment for theft, it is sought to hold the defendant liable under evidence proving the receipt and concealment of stolen goods, the verdict of the jury should show that they found him guilty of receiving and concealing stolen property, knowing it to be stolen. This is recommended as the better practice, and the reasons for its observance will be found in the cases of *Vincent v. State*, 9 Texas Ct. App. 46; *McCampbell v. State*, 9 Texas Ct. App. 124, and *Cohea v. State*, 9 Texas Ct. App. 173.

Because of error in the charge of the court as above indicated and discussed, the judgment is reversed and the cause remanded.

Reversed and remanded.

INDEX.

A.

ACCOMPLICE TESTIMONY.

1. Corroboration of accomplice testimony must be effected by the evidence other than that of the accomplice himself; the facts to be corroborated must be criminative of the defendant; and the corroborative evidence must tend to connect the defendant with the offense committed. *Harper v. State*, 1.

2. At the appellant's trial for incest with his step-daughter she was the principal witness for the State, and portions of her testimony tended to inculcate herself. *Held*, that the trial court should have given in charge to the jury the statutory provisions controlling accomplice testimony and its corroboration. *Freeman v. State*, 92.

3. If a witness implicates himself, his statement that his participation was compulsory raises an issue of fact on the solution of which depends the question whether his testimony is or is not that of an accomplice. *Id.*

4. While conspiracy cannot be established by the confessions of a co-conspirator to third parties after the offense, and in the absence of defendant, yet, if the co-conspirator is placed upon the stand, it is competent for him to testify not only to the conspiracy but to all matters material to the issue; but in such case corroboration is essential to sustain a conviction. If, however, the conspiracy has been legally established, the acts, declarations, etc., of a co-conspirator, before the completion of the offense, are admissible, and the rule which requires corroboration does not apply. *Cohea v. State*, 153.

5. See evidence in a trial for theft held insufficient to corroborate an accomplice witness. *Hinds v. State*, 238.

6. In a trial for theft the daughter of the accused was a witness for the State, and it was in proof that she had falsely denied any knowledge of the stolen money. *Held*, that this fact alone did not suffice to render her an accomplice witness. *Rhodes v. State*, 563.

7. It is not necessary that the other evidence shall corroborate that of the accomplice as to any particular statement made by him; but, whatever the amount of the corroborative evidence, it does not avail unless it tends to connect the defendant with the offense committed. *Cohea v. State*, 622.

AFFIDAVIT.

See INFORMATIONS.

SEVERANCE.

1. A *nolle prosequi* of a former information does not preclude the use of the affidavit therefor as the basis of a new information. *Goode v. State*, 2 Texas Ct. App. 520, cited on this subject with approval. *Boyd v. State*, 80.

2. An affidavit under article 772, Code Criminal Procedure, which avers that "the witnesses reside out of the State of Texas, and are residents of the Indian Territory," is sufficient as to non-residence, and non-jurisdiction of the court. *Ballinger v. State*, 823.

3. The Code of Procedure, article 431, enacts that no information shall be presented until oath in writing has been made by some credible person charging the defendant with an offense. No form for the affidavit is prescribed, and substantial compliance with the provisions of the Code is sufficient. *Brown v. State*, 451.

4. To an affidavit for an information it is objected that the commission of the inculpatory act is not alleged positively, but only to "the best of the knowledge and belief" of the affiant. *Held*, that the allegation is sufficient, and the objection not tenable. *Id.*

5. No offense is charged by an information which, without itself alleging the inculpatory act, refers to the "affidavit which is herewith filed and shows" the commission of the act by the accused. *Id.*

AGGRAVATED ASSAULT.

1. To constitute an assault and battery the injury must be intentionally inflicted; but when injury is inflicted by violence the intent to injure is presumed, and it devolves upon the defense to repel the presumption by countervailing proof. The intended injury may be bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind. Manipulation of a woman without her consent, in order to obtain sexual knowledge of her person, may superinduce such emotions without inflicting bodily pain. *Atkins v. State*, 8.

2. See evidence held sufficient to sustain a conviction for aggravated assault and battery committed by unwarranted approaches to a woman. *Id.*

3. Clause 5, article 496 of the Penal Code declares that an assault becomes aggravated when committed by an adult male on a female or child, or by an adult female on a child. *Held*, that "adult" means a person who has attained the age of twenty-one years; and in a prosecution based on this clause the State must prove that the defendant was an adult when the assault was committed. *George v. State*, 95.

4. But, under clause 6 of the same article, a male minor could, it seems, commit an aggravated assault on a female by violent familiarity with her person, against her will, with intent to have sexual knowledge of her. *Id.*

AGGRAVATED ASSAULT—continued.

5. Aggravated assault and aggravated assault and battery being synonymous as used in our statute, the technical inaccuracy of their use as convertible terms is not an objection to the charge of the court. *Gaston v. State*, 148.

6. Want of specific proof that the defendant was an adult male is not an available objection, when the record shows that the question was not in controversy below, and is not suggested by the facts in evidence. *Id.*

7. The substance of a charge asked was that if the jury believed from the evidence that when the defendant struck the prosecuting witness with a plow-line she was in the act of turning defendant's mule from a water-trough, though admonished not to do so, whereupon he struck her with the plow-line: *Held*, properly refused as being a charge upon the weight of evidence, and as obnoxious to art. 491, Penal Code, which justifies the use of a necessary degree of force to effect the lawful purposes specified. *Id.*

ALIBI.

See **NEW TRIAL**, 5.

1. *Alibi*, equally with any other defense interposed to a prosecution, when the evidence tends to support it in any degree, is the subject of explanation by charge, and the refusal of a proper charge thereon is error. *Long v. State*, 881.

2. *Alibi* being the defense interposed, the court below erred in failing to charge sufficiently the law on that issue. *Granger v. State*, 454.

ALTERATION.

See **VARIANCE**, 1.

AMENDMENT.

See **PRACTICE IN COURT OF APPEALS**, 12.

1. Amendment of formal defects in an information is allowable, but not of substantial defects. *Brown v. State*, 451.

2. *Quære*. Whether the substance of an information can be amended by consent of the parties,—the Code of Procedure, article 550, providing that "No matter of substance can be amended." *Id.*

3. Charge of the court when read to the jury must be filed, and from that time constitutes a part of the record in the cause. Its alteration or amendment without the consent of the defendant is such error as will necessitate reversal of a conviction. *Granger v. State*, 454.

APPEAL.

See **PRACTICE**, 1.

Though a convicted defendant has a right of appeal in any criminal action, yet he is not convicted until judgment final is rendered against him. If, therefore, the record on appeal shows no final judgment in the trial court against the appellant, the appeal will be dismissed by this court. *Pennington v. State*, 281.

ARREST.

See **CONFESSIONS.**

ASSAULT.

See **AGGRAVATED ASSAULT.**

ASSAULT WITH INTENT TO ROB.

INFORMATIONS, 8.

On a trial for aggravated assault a conviction may yet be had for simple assault, though the Revised Penal Code omits the former provision expressly authorizing such convictions. *Kennedy v. State*, 78.

ASSAULT WITH INTENT TO MURDER.

See **MALICE.**

ASSAULT WITH INTENT TO ROB.

Robbery and assault with intent to rob are offenses specifically known to and defined by the Penal Code. *Robinson v. State*, 309.

B.**BAIL.**

See **BAIL-BOND.**

SCIRE FACIAS.

1. *Prima facie*, the sum of five hundred dollars is not an unreasonable or excessive amount to require as bail upon a charge of felony. Whether excessive in fact depends largely upon the pecuniary condition of the accused. A sum which would be trivial to a wealthy man might be oppressive of a poor one. *Ex parte Hutchings*, 28.

2. To authorize this court to reduce an ostensibly reasonable amount of bail fixed by the court below, the pecuniary circumstances and ability of the applicant should be shown in the record. *Id.*

BAIL-BOND.

See **BAIL.**

1. A legal instrument is not invalidated by the omission of a word essential to its validity if the omitted word be clearly indicated by the context. *Roberts v. State*, 26.

2. A bail-bond was conditioned for the payment of "\$500 five hundred ———," and its validity is contested on the ground that it expresses no sum of money. But *held* that the dollar-mark and figures sufficiently express the amount. *Id.*

3. Bail-bond described the offense as an "assault with intent to rob." It is urged that this expression designates no offense under the law of this State, because not tantamount to "assault with intent to commit the offense of robbery." But *held* that the designation used in the bond is correct. *Robinson v. State*, 309.

BAIL-BOND — continued.

4. If the final judgment on a forfeited bail-bond be erroneous by reason of repugnancy between it and the judgment *nisi*, the error could be corrected on appeal, without remanding the case to the court below. *Id.*

5. Plaintiff in error was surety for one S. on the latter's bond for appearance in the County Court, to answer the State on a charge of theft. Indictment was subsequently found in the District Court against S. for petty theft, but neither it nor an information was presented in the County Court at its first term after the execution of the bond, nor did the State's attorney show cause and obtain an order of court preventing the lapse of the bond, as provided in article 592, Code of Procedure. Nevertheless, forfeiture of the bond was entered in the County Court and such further proceedings had as resulted in final judgment against the plaintiff in error as surety. *Held*, that the sureties on the appearance bond were discharged from liability by reason of the non-presentment of an indictment or information against their principal at the first term of the County Court after the execution of the bond. Wherefore the judgment of the court below is not only reversed, but the cause is dismissed. *Jones v. State*, 412.

6. When the offense of which the principal obligor is accused is named in the bail-bond, and it appears therefrom that he is accused of an offense against the laws of this State, it is not necessary that the bond shall disclose the mode of the accusation,—*i. e.*, whether it is by indictment, information, or otherwise. *McGee v. State*, 520.

7. Article 764 of the original Penal Code made theft from a house a felony irrespective of the value of the property taken, and as its penalty prescribed a penitentiary term of which the maximum was less than that prescribed for ordinary theft of property worth twenty dollars or more; but the repeal of that article in 1876 had no other effect than to subject theft from a house to the same punishment as that prescribed for ordinary theft. Since the repeal of said article, therefore, as well as prior thereto, a bail-bond designating theft from a house as the accusation against the principal offender conforms to the requirement that such a bond shall name an offense against the laws of this State. *Id.*

8. If the court before which the principal obligor is bound to appear has no authority to require him to answer the charge against him, it has no power to adjudge a forfeiture of his bail-bond. See the opinion *in extenso* on this subject. *Id.*

9. *Wilson v. State*, 25 Texas, 169, overruled in so far as it sustains the validity of a bail-bond which misstates the offense charged against the principal obligor. *Id.*

10. The condition of a bail-bond stipulated that the principal obligor should make his appearance before the proper court at its next ensuing term, and should there remain from day to day and

BAIL-BOND — continued.

from term to term until discharged, but omitted to stipulate that he should answer the accusation against him. *Held*, that the omission does not impair the validity of the bond. *Gary v. State*, 527.

11. A surety signed a blank bail-bond and delivered it to his principal to be filled up with the penal sum of \$300. The principal, being required to give bail in \$1,000, presented the blank bond with the surety's signature, and the examining magistrate filled it with the sum of \$1,000, conditioned for the appearance of the principal. The principal failed to appear and the bond was forfeited, and the surety, in defense to the *scire facias*, alleged the facts and pleaded *non est factum* to the bond. *Held*, that the act of the surety in signing and delivering the blank bond, knowing its purpose, made him liable for the amount inserted in it by the examining magistrate, who accepted it in ignorance of any limit to the surety's authorization. *Id.*

12. The Code of Procedure, article 462, provides that if a party arrested under a *capias* for felony had previously given bail to answer said charge, his sureties shall be released by the arrest, and he shall be required to give new bail. *Held* that, in a *scire facias* proceeding upon the original bail-bond, it was competent for the State to controvert and disprove the sheriff's return on the *capias* to the effect that he had executed it by arresting the party. But it seems that a sheriff's return on a *capias* that he had "executed" it, without showing how, does not purport an actual arrest of the party. *Id.*

13. *Scire facias* proceedings on forfeited bail-bonds are not within the provision of the Code of Procedure which prohibits a new trial after verdict for the defendant. *Id.*

BILL OF EXCEPTIONS.

See PRACTICE IN COURT OF APPEALS, 3.

1. To enable this court to pass upon errors assigned upon the evidence, it is indispensable that the evidence involved in the inquiry be brought up in the record by a statement of facts or bill of exceptions. If the evidence be not thus brought up, this court can only revise the indictment and consider whether the charge of the court below correctly and sufficiently enunciated to the jury the law applicable to any state of facts germane to the indictment. *White v. State*, 38.

2. In the course of the trial the defense excepted to certain rulings of the court upon the evidence, and asked time to prepare proper bills of exceptions. *Held*, error to refuse the request. *Sager v. State*, 110; *Knox v. State*, 148.

3. When no authentic statement of facts appears in the record, but a proper bill of exceptions show that there was no proof of the venue of the offense, or no sufficient identification of the defendant

BILL OF EXCEPTIONS—continued.

as the culprit, this court must assume the verity of these defects in the proof, and will set aside the conviction. *Durley v. State*, 172.

4. Affidavits will not suffice to authenticate the recitals in a bill of exception, which are qualified or disputed by the trial judge in his note of explanation thereto. If the court refuses a full and fair bill of exceptions, the defendant is authorized to resort to by-standers. *Lindley v. State*, 283.

5. Having no right of appeal in a criminal cause, the State has no right to a bill of exceptions. *Lawrence v. State*, 306.

6. Bills of exceptions must state enough of the evidence or facts proved to render intelligible the ruling excepted to. The signature of the judge to the bill of exceptions certifies only that the objections stated were the ones urged, not that they were true in fact. *Ballinger v. State*, 323.

BRIBERY.

1. Appellant was indicted for offering to bribe one L, "a deputy sheriff of said county." The State having proved that L. at the date alleged was and for some time had been acting as deputy sheriff and jailor of the county, the defense proposed but was not permitted to prove that L. had not been appointed in writing, nor sworn, nor otherwise qualified as directed by article 4520 of the Revised Statutes. *Held*, that it was sufficient for the State to prove that L. was a deputy sheriff *de facto* at the date alleged. The regularity of his appointment and qualification was not an issue in the case, and therefore the proof proposed by the defense was properly excluded. *Florez v. State*, 102.

2. The alleged object of the corrupt offer was to obtain the release of a prisoner who was in the custody of L. as jailor, and it is contended by the appellant that, inasmuch as no *mittimus* to L. was in proof, the prisoner was not legally in his custody. But *held* that the manner in which the jailor became charged with the custody of the prisoner was a matter into which the appellant was not entitled to inquire. *Id.*

BURGLARY.

1. The Penal Code, article 704, makes it burglary to enter a house at night by force, threats or fraud, with intent to commit felony or theft, and further provides (in article 706) that the entry into a house, within the meaning of article 704, "includes every kind of entry but one made by the free consent of the occupant," etc. *Held*, that this latter provision is not to be so construed as to eliminate from the definition of the offense the element of "force, threats or fraud," nor to dispense with the necessity of alleging and proving that the entry was effected by some one or more of those modes. It does not suffice, therefore, to allege and prove an entry made without the consent of the occupant or of some one authorized to

BURGLARY — continued.

give consent; but some one of the statutory modes of entry, as well as the fact of entry, must be alleged and proved in order to constitute the offense. Note in the opinion a collocation of the articles of the Penal Code which affect this question, and the elucidation of their import and interdependence. *Hamilton v. State*, 116.

2. Appellant was convicted of burglary on an indictment which charged a nocturnal entry effected by fraud. The evidence relied on to prove the entry and fraud tended to show that he took off his shoes and entered through an open door, without the consent of anyone. *Held*, not sufficient to prove that the entry was effected by fraud. *Id.*

3. The intent alleged was to commit a rape by force, and the evidence relied on to prove it tended to show that one of the three females in the house was awakened by something touching her foot, and, screaming, saw a man running away through an open door. *Held*, not sufficient to prove the intent alleged. *Id.*

4. In a prosecution for burglary with intent to commit theft, it is incumbent on the court to give in charge to the jury the law of theft as well as that of burglary. *Castenada v. State*, 390.

5. Appellant was convicted of burglary on an indictment which charged him as an accomplice to the crime, alleging that, though not present at its commission, he advised and encouraged the principal offender before it was done, and furnished him aid in its perpetration. The chief evidence of the guilt of the principal offender and the complicity of the defendant on trial was the testimony of one B., who was a *particeps criminis*. The defense asked the court to instruct the jury that "corroborating testimony tending to connect the principal with the offense will not be sufficient to convict the defendant as an accomplice." *Held*, that this was a correct principle of law and not a charge on the weight of the evidence; and, being applicable to issues raised by the evidence, and not comprised in the main charge of the court, the trial court erred in refusing to give it to the jury. *Cohea v. State*, 622.

6. See evidence *held* insufficient to corroborate such parts of an accomplice's testimony as tended to incriminate the defendant. *Id.*

C.

CARRYING WEAPONS.

1. At a trial for unlawfully carrying a pistol there was evidence tending to prove that the cylinder of the pistol was not attached to it nor in the defendant's possession when the State's witness saw him with the weapon. *Held*, that the trial court erred in refusing a special instruction for acquittal in case the jury so found the facts. *Cook v. State*, 19.

CARRYING WEAPONS — continued.

2. Though not technically a peace-officer or a policeman, a sergeant or under-officer in the penitentiary service is, while in charge of a convict camp and engaged in duties incidental thereto, a "civil officer engaged in the discharge of official duty," within the meaning of article 819 of the Penal Code, and as such is expressly exempt from amenability for carrying a pistol. *Carmichael v. State*, 27.

3. A city ordinance made it penal to carry prohibited weapons within the corporate limits, but omitted to exempt travelers as does the Penal Code of the State. *Held*, that the ordinance is not therefore void, but should be construed in subordination to the provisions of the Code, which except travelers and certain other classes from the inhibition. *Boland, Ex parte*, 159.

CASES OVERRULED.

Wilson v. State, 25 Texas, 169, overruled in so far as it sustains the validity of a bail-bond which misstates the offense charged against the principal obligor. *McGee v. State*, 520.

CHALLENGE TO THE ARRAY AND OTHERWISE.

See JURORS AND JURY.

1. Challenge to the array or to any member of a grand jury is authorized by the Code of Procedure, but it defines the only causes for challenge and explicitly requires the challenge to be made before the grand jury is impaneled,—securing to a prisoner in the county jail the right, upon his request, to be brought into court to make the challenge. *Held*, that by these provisions the right to impeach the qualifications or the legality of a grand jury is limited to the time prescribed and confined to the causes specified; and a prisoner who has omitted to request that he be brought into court to make the challenge cannot impeach the grand jury by pleading in abatement of the indictment preferred against him. *Kemp v. State*, 174.

2. To an indictment for murder the defendant pleaded in abatement that he was in jail when the grand jury was organized; that he was a friendless minor without means to employ counsel, and had no counsel until after the indictment was presented; that he was not apprised of his right to challenge the array or any member of the grand jury; that the persons composing it were not selected for the term by the jury commissioners, nor was the list of them certified by the commissioners as required by law; that the envelope containing the list was not properly indorsed, and was opened by the clerk before he was authorized by law to open it; that the grand jurors were summoned by an unauthorized person, and that one of them was a principal witness against the defendant. *Held*, that the plea was properly overruled. See the opinion for a collocation of the articles of the Code of Procedure which control the subject. *Id.*

CHALLENGE TO THE ARRAY AND OTHERWISE — continued.

3. Unless requested by a prisoner confined in the county jail, the opportunity to challenge the grand jury is not a matter of right; but with a view to the prevention of improper prosecutions, the practice of affording such prisoners an opportunity to challenge the grand jury is one to be commended. *Id.*

4. If the defendant had not exhausted his peremptory challenges when the panel was filled, it is not material on appeal that his challenges for cause were erroneously overruled by the trial court. *Lum v. State*, 488.

CHARGE OF THE COURT.

See DRUNKENNESS, 2.

EMBEZZLEMENT, 4.

INCEST.

INTENT, 5.

THEFT, 2.

VARIANCE, 1.

1. Though it is incumbent on the State to prove an offense not barred by limitation, yet there is no occasion to instruct the jury as to the period of limitation when nothing in the evidence raises a question whether the prosecution is barred. *Hoy v. State*, 82.

2. Having retired to consider of their verdict in a felony case, the jury returned into court and asked to be instructed whether they were authorized to weigh the credibility and character of witnesses. The court instructed them that they were the exclusive judges of the credibility of the witnesses and the weight of the testimony. *Held*, a correct and sufficient response to the question of the jury. *Shipp v. State*, 46.

3. It is not incumbent on the trial judge to give in charge to the jury the law applicable to a deduction which the jury could not reasonably draw from the evidence. *Williams v. State*, 62.

4. In a trial for murder there was evidence tending to prove that the deceased had made threats to kill the defendant, and that, when shot by the defendant, he had a pistol upon his person and was advancing on the defendant in a violent and threatening manner. *Held*, error to so charge the jury as to condition the defendant's right of self-defense upon his having resorted to all other preventive means, save retreat, before firing upon the deceased. On the contrary, if it reasonably appeared by the acts of the deceased, or by his words coupled with his acts, that it was his purpose to take the life of the defendant, or to do him serious bodily harm, the defendant, before slaying the deceased, was not bound to resort to all other preventive means save retreat, but had the right to slay him instantly and with the most effective means. This right accrued to the defendant not only at the very time the attack was being made upon him, but at any time after some act was done

CHARGE OF THE COURT—continued.

by the deceased showing an evident intent to take the life of the defendant. *Foster v. State*, 105.

5. Instructions to juries should carefully avoid confounding the essential distinctions which the Penal Code, in articles 570 and 572, establishes between those cases in which the assaulted party may slay his assailant without resorting to other means of prevention, and those in which it is incumbent on him to first resort to all such means save retreat. *Kendall v. State*, 8 Texas Ct. App. 569, cited on this subject with emphatic approval. *Id.*

6. In a trial for aggravated assault on a woman, the defense asked a charge for acquittal if the jury believed from the evidence that when the defendant struck the prosecuting witness with a plow-line she was in the act of turning defendant's mule from a water-trough, though admonished not to do so, whereupon he struck her with the plow-line: *Held*, properly refused as being a charge upon the weight of evidence, and as obnoxious to art. 491, Penal Code, which justifies the use of a necessary degree of force to effect the lawful purposes specified. *Gaston v. State*, 143.

7. Aggravated assault and aggravated assault and battery being synonymous as used in our statute, the technical inaccuracy of their use as convertible terms is not an objection to the charge of the court. *Id.*

8. The trial judge commenced his charge to the jury by informing them that the homicide was committed in another county, and that "the case is in this court by change of venue." Objection to this is based on the fact that the transcript of the proceedings of the court *a quo* had not been filed in the trial court. *Held*, that the judge was fully warranted in apprising the jury of the *status* of the case, and the omission to file the transcript was a mere irregularity which was amenable to subsequent correction. *Kemp v. State*, 174.

9. It follows that, if the charge to the jury in a trial for murder fails to define or explain the element of malice, it fails to present the "law applicable to the case," as required by the Code. *Holmes v. State*, 223.

10. If, as in the present case, the appellant was convicted of murder in the court below, and the record on appeal shows that no definition or exposition of the term malice was given in charge to the jury, this court is authorized to set aside the conviction on that account, notwithstanding the appellant failed to ask a proper instruction in the court below, but raised the question in his motion for a new trial. *Id.*

11. Even if tenable under any circumstances, the objection that the charge of the court was not filed until the day after it was read to the jury, comes too late when made for the first time in this court. *Lowe v. State*, 253.

CHARGE OF THE COURT — continued.

12. The indictment charged the defendant and Wm. Lowe jointly, and the caption of the charge so stated the case, but the first paragraph announced to the jury the severance of the two, and the separate trial of the defendant. *Held*, that the charge so stating the case raises no presumption that it was prepared for or given in a case other than that on trial. And if it had been, and was applicable to the case on trial, the fact that it had been used in another case would not be ground for new trial. *Id.*

13. In a trial for murder the law of self-defense, though invoked by the evidence, was charged in a merely negative form, and the charge was applicable to a case in which the accused gave the provocation, though there was no evidence tending to support that theory. But the defense neither excepted to the charge at the time nor relied on its errors in his motion for a new trial, and it is not obvious that the accused, who was convicted of manslaughter, was seriously prejudiced by the errors in the charge. *Held*, that the objections to the charge come too late, being mooted in this court for the first time. *Gardner v. State*, 265.

14. It was error to charge that the unexplained possession of recently stolen property is a fact from which alone guilt of the theft may be inferred, irrespective of the attending and surrounding circumstances, and particularly of the further inquiry whether there was occasion and opportunity for explanation by the accused. *Williams v. State*, 275.

15. In a trial for horse-theft the trial court charged the jury that if the horses, prior to the theft, were last seen in the county where the venue was laid, the law presumed that they were stolen in that county. *Held*, erroneous because there is no such legal presumption, and because the charge was on the weight of the evidence and invaded the province of the jury. *Id.*

16. The defendant in this case interposed no objection to the charge complained of when it was given, nor did he point out or specify in his motion for new trial his ground of objection. That the court erred in its charge is an allegation in a motion for new trial too general to authorize review by this court, unless the error be fundamental or injury apparent. *St. Clair v. State*, 297.

17. A requested instruction to the jury was refused by the trial judge because it was not filed before it was presented. *Held*, no reason at all. *Lawrence v. State*, 306.

18. In a trial for theft the evidence showed that the defendant took the property openly and in the belief that he had a right to do so. *Held*, error to refuse an instruction for acquittal in case the jury so found the fact; and error to refuse a new trial. *Id.*

19. Charge of the court which embodies an erroneous instruction as to the punishment prescribed for the offense on trial, is ground for reversal, even though it gave the defendant the benefit of a

CHARGE OF THE COURT — continued.

lighter punishment than that prescribed by the statute. *Cohen v. State*, 337.

20. Charge of the court instructed the jury that "the open and public manner in which property is taken and claimed will not, in any manner, lessen or excuse the offense, if the same was taken with guilty knowledge and fraudulent intent." *Held*, correct as an abstract proposition, but, in view of the evidence, negative in nature and effect, and calculated to mislead the jury. *Ainsworth v. State*, 339.

21. Whatever may be the defense interposed, it is the duty of the court to apply clearly, pertinently and affirmatively the law applicable to the facts tending to support it. *Id.*

22. Charge of the court in a trial for murder, or assault with intent to murder, is deficient if it fails to define malice. *Garza v. State*, 345.

23. This court will not review instructions complained of, when the accused has reserved no bill of exceptions thereto, nor asked any charge upon the issues in controversy. *Id.*

24. In a trial for fornication the court charged the jury that "every person is presumed to be innocent until his or their guilt is established by legal testimony; but if the proof in cases like this shows that the defendants did live and sleep together in the same room, and had for a series of months, it is strong evidence against the accused." *Held*, that this was a flagrant charge upon the weight of the evidence, and is error for which this court has no option but to reverse. *Hill v. State*, 379.

25. *Alibi*, equally with any other defense interposed to a prosecution, when the evidence tends to support it in any degree, is the subject of explanation by charge, and the refusal of a proper charge thereon is error. *Long v. State*, 381.

26. See this case for circumstances under which it was proper for the court to admit evidence of the defendant's possession of other animals at the time he was found in possession of the animal charged to be stolen, but whereunder the court should have explained the legal effect of such evidence. *Id.*

27. In a prosecution for burglary with intent to commit theft, it is incumbent on the court to give in charge to the jury the law of theft, as well as that of burglary. *Castenada v. State*, 390.

28. However correct a principle of law may be in the abstract, it is error to give it in charge when there is a total want of evidence to support the phase of case to which it is applied. See the opinion *in extenso* for a discussion of the rule, and this case for an example. *Conn v. State*, 390.

29. If the jury after retirement desire further instruction upon a question of law, they are authorized to appear before the court in a body, and ask through their foreman, either verbally or in writing,

CHARGE OF THE COURT — continued.

such additional instruction; and if the subject-matter of the requested charge be proper, the court has no option but to give it, which it must do in writing. If the subject-matter be improper, the court should so inform the jury in writing. *Id.*

80. After being out from 10 o'clock P. M. until 8 o'clock P. M. on the next day without agreement, the jury came into court, and their foreman handed a written paper to the judge. The record does not disclose what was written on the paper. To this the judge replied verbally, "I can answer your communication, but I don't think it proper. I covered the point in my charge." The court then proceeded to say to the jury: "There is another case here that cannot be tried until this is decided. It is ruining. The State pays you two dollars a day, and unless you decide, I will keep you here until Monday morning." To this entire proceeding the defendant excepted. *Held*, that the exception was well taken; that the contents of the paper should have been disclosed by the court, and that the statements of the court to the jury were improper. *Id.*

81. Charge of the court which, upon the question of self-defense, abridges the right of a defendant to act upon reasonable appearance of immediate danger to life or of serious bodily harm; or that instructs the jury in effect that they must find affirmatively that the danger was actual and real, or that the defendant must show affirmatively that he could not reasonably know that the danger threatened was not in fact real, is error. *Jordan v. State*, 435.

82. Charge of the court when read to the jury must be filed, and from that time constitutes a part of the record in the cause. Its alteration or amendment without the consent of the defendant is such error as will necessitate reversal of a conviction. *Granger v. State*, 454.

83. When additional instructions are allowed to be given at the request of the jury, they can only be given when the defendant is present in court. *Id.*

84. The court, of its own motion, altered its charge in the absence of the defendant and without his knowledge or consent; of which action he complained in his motion for new trial. *Held*, that whether or not the alteration was material, the action of the court was error. *Id.*

85. *Alibi* being the defense interposed, the court below erred in failing to charge sufficiently the law on that issue. *Id.*

86. Charge of the court directed the jury, in the event of finding from the evidence that the defendant was guilty of murder in the second degree, to assess his punishment at confinement in the penitentiary for any length of time "not less than five,"—the word "years" being omitted. *Held*, that the context supplies the omitted word, "years," and that the omission could not have misled the jury. *Hill v. State*, 456.

CHARGE OF THE COURT — continued.

87. Adequate cause is an essential element of the offense of manslaughter. In the absence of evidence tending to show the existence of adequate cause, the court did not err in refusing a charge upon manslaughter. *Id.*

88. Article 614 of the Penal Code embodies the law of a case in which there was no intention to kill, and when the homicidal act was divested of the elements of an evil and cruel disposition. Under it the person offending may be prosecuted and convicted of any grade of assault and battery. Note the state of proof held in this case to necessitate a charge to the jury embodying the law as enacted in said article 614. *Id.*

89. Charge of the court is measurable by the evidence, and need not transcend the legitimate deductions therefrom. *Lum v. State*, 488.

40. When the chief inculpatory fact in a trial for theft was possession of the stolen property recently after the theft, it was error to refuse a requested instruction to the effect that such possession was not of itself sufficient to warrant a conviction. *Dreyer v. State*, 508.

41. In a trial for murder the court charged the jury that an adulterer, caught in the act of adultery, has no right to resist an attack made upon him by the husband. *Held*, that the instruction is erroneous because it deprives the slayer absolutely and entirely of all right of self-defense, regardless of the legal principles which, while according that right plenarily to him only who acts from necessity and is himself without fault, do not wholly deny it to him who, when caught in the perpetration of a misdemeanor and assaulted by the person aggrieved thereby, kills the latter to save his own life. Adultery is only a misdemeanor in this State, and therefore the instruction given to the jury transcends the law. See the opinion *in extenso* on the distinction between the perfect and imperfect right of self-defense. *Reed v. State*, 509.

42. It was in proof that the defendant was in possession of the stolen cattle soon after they were missed by the owner, and the defense adduced evidence of a purchase of them by the defendant. Counsel for the defense asked an instruction to the effect that the defendant's possession was not an inculpatory fact if he purchased the cattle in good faith and believing his vendor had the right to sell them. *Held* that, whether the requested instruction was correctly framed or not, it sufficed to devolve upon the court the duty of giving to the jury the law which controlled the issue raised by the evidence. *Anderson v. State*, 576.

43. In a trial for theft the court charged the jury as follows: "The possession of recently stolen property is not conclusive evidence of the guilt of the person having such possession; but such possession, if proved, may be taken into consideration as a circum-

CHARGE OF THE COURT—continued.

stance, in connection with all the other facts and circumstances which may have been proven in the case, to enable you to determine as to the guilt or innocence of the accused." *Held*, a charge upon the weight of the evidence, and in direct violation of the provision of the Code of Procedure which inhibits such charges. *McWhorter v. State*, 584.

44. Not the slightest intimation of the opinion of the court upon the facts of the case should be communicated to the jury. *Id.*

45. See evidence in a trial for murder which, it is held, justified the trial court in giving in charge to the jury the law of aiders and abettors. *Reed v. State*, 587.

46. Appellant was convicted of burglary on an indictment which charged him as an accomplice to the crime, alleging that, though not present at its commission, he advised and encouraged the principal offender before it was done, and furnished him aid in its perpetration. The chief evidence of the guilt of the principal offender and the complicity of the defendant on trial was the testimony of one B., who was a *particeps criminis*. The defense asked the court to instruct the jury that "corroborating testimony tending to connect the principal with the offense will not be sufficient to convict the defendant as an accomplice." *Held*, that this was a correct principle of law and not a charge on the weight of the evidence. *Cohea v. State*, 622.

47. The jury were instructed for acquittal in case the defendant in good faith purchased the stolen animals, but were further instructed that a fraudulent sale was no defense. *Held*, that the jury may have been misled by this latter instruction. See the opinion *in extenso* on the point, and also in elucidation of the opinion in *Shoefercater v. State*, 5 Texas Ct. App. 207. *Dreyer v. State*, 631.

48. It is error in a trial for theft to so charge the jury as to permit the conviction of the accused without proof of guilty knowledge or intent. *Id.*

49. When the inculpatory evidence is circumstantial it is error to refuse a requested instruction which correctly expounds the cogency requisite in that character of proof. *Id.*

CONFESSIONS.

See CONSPIRACY.

EVIDENCE, 81.

1. The Code of Procedure, article 750, expressly inhibits proof of extrajudicial confessions by an unwarned prisoner unless, in connection therewith, he stated facts or circumstances that are found to be true, and which conduce to establish his guilt. If the inculpatory circumstances disclosed by the prisoner are proved to be true, what he said in disclosing them is admissible against him for the purpose of explaining the disclosures themselves. But the

CONFESSIONS — continued.

truth of the inculpatory circumstances must be shown by evidence *aliunde* the statement of the prisoner. *Kenyon v. State*, 356.

2. In a trial for horse-theft the State was permitted, over objection by the defense, to prove that the defendant, while in legal custody and not warned that his statements might be used against him, said, in substance, that one S. got the animal at a certain locality and in the night, and brought it to him, the defendant, and that he took a bell from around its neck and rode it off. The State proved that the animal was taken in the night and from a locality corresponding with that described by the defendant, and that, when last seen before it was stolen, it had a bell around its neck; but, aside from the defendant's statement, there was no proof that he took the bell off the animal and rode it away. *Held* that, assuming that these latter circumstances would, if shown to be true, conduce to establish the guilt of the defendant, the disclosure of them by the defendant, while he was in custody and uncautioned, was not evidence against him; and their admission over his objection was error. *Id.*

3. While the defendant was in a bar-room violating a city ordinance, the marshal of the city was notified, and summoned a *posse* and confined the defendant in a neighboring crib. *Held*, that notwithstanding the marshal's testimony that he did not "consider" that he had the defendant under arrest, the arrest was complete, and statements made by the defendant under such circumstances were not admissible as evidence against him. *Grosse v. State*, 364.

4. There is an established distinction between the competency as evidence of acts done and confessions made by a defendant in arrest. The former are admissible, but the latter, unless clearly within the provisions of the statute, are not admissible. *Rhodes v. State*, 563.

5. It being already in proof in a trial for theft of money that the defendant and her little daughter were arrested for the offense, and that disclosures made by the latter induced the officer to take the defendant to her house, with expectation of recovering the money there, the State was further allowed, over objection by the defense, to prove that the defendant, after reaching her home, and while still in arrest and uncautioned, voluntarily raised a plank and seemed to be searching under it for the money. *Held*, that there was no error in allowing this act of the defendant to be put in evidence. It was not a confession. *Id.*

CONSPIRACY.

1. Conspiracy to commit an offense cannot be proved by the confessions of a co-conspirator made to witnesses as to the consummation of the offense, and in the absence of the defendant. *Cohea v. State*, 153.

CONSPIRACY — continued.

2. C. testified that B. confessed to him, in the absence of defendant, that he and defendant had conspired to commit the offense, and V. testified that C. repeated to him B.'s confession; after which B. was introduced by the State and testified to the conspiracy, and to the commission of the offense in pursuance thereof. *Held*, that the evidence of C. was hearsay, and that of V. doubly so, and inadmissible because (1) conspiracy cannot be shown by the acts, declarations or confessions of a co-conspirator, but must be proved *aliunde*; and (2) because neither the acts, declarations nor confessions of a co-conspirator, done or made after the completion of the offense, are admissible. But to authorize revision by this court it must appear that objection to such proof was made when it was offered. *Id.*

3. While conspiracy cannot be established by the confessions of a co-conspirator to third parties after the offense, and in the absence of defendant, yet, if the co-conspirator is placed upon the stand, it is competent for him to testify not only to the conspiracy but to all matters material to the issue; but in such case corroboration is essential to sustain a conviction. If, however, the conspiracy had been legally established, the acts, declarations, etc., of a co-conspirator, before the completion of the offense, are admissible, and the rule which requires corroboration does not apply. *Id.*

CONSTITUTIONAL LAW.

1. The requirement that all prosecutions for offenses against the laws of the State must be carried on in the name of "The State of Texas" does not preclude an incorporated town from providing that offenders against its penal ordinances shall be prosecuted in its municipal name. *Boland, Ex parte*, 159.

2. Section 14, article 1, of the State Constitution ordains that "No person, for the same offense, shall be twice put in jeopardy of life or liberty." *Held*, that the term "same offense" as here used does not signify the same offense *eo nomine*, but the same criminal act or omission. See the opinion *in extenso* on the subject of jeopardy. *Hirshfeld v. State*, 207.

3. Article 714 of the Revised Code of Procedure, which authorizes a conviction for embezzlement under an indictment for theft, is constitutional. *Whitworth v. State*, 414.

CONTINUANCE.

1. Diligence is not shown by merely alleging a timely procurement of process for the absent witness. A proper disposition of the process must also be alleged. *Atkins v. State*, 8.

2. Refusal of a continuance will not be revised on appeal unless the transcript brings up a bill of exceptions duly reserved. *Delphino v. State*, 30.

CONTINUANCE — continued.

3. No application for a continuance asked on account of the absence of a witness is now grantable as a matter of right; but, when a continuance has been refused and the defendant convicted, if it appeared at his trial that the evidence of the absent witness was material and probably true, then a new trial should be granted. *Williams v. State*, 68.

4. Defendant's application for a continuance stated that he caused a subpoena to issue "immediately after his arrest," but left the time of his arrest unstated; and then alleged that the subpoena was returned "not found," and that "thereupon he caused an attachment to issue," but nowhere disclosed when the attachment was issued or the subpoena returned. *Held*, that these allegations were too indefinite to show diligence. *Pullen v. State*, 89.

5. If in an application for a continuance the disposition made of the process is alleged upon information and belief, the name of the informant should be disclosed. *Id.*

6. All applications of a defendant for a continuance on account of the absence of a witness must state that the witness is not absent by the defendant's procurement or with his consent. *Id.*

7. The action of the trial court in refusing a continuance will not be revised unless challenged there and presented to this court by an authenticated bill of exceptions. Recital in the judgment that a continuance was refused, and that the defendant excepted, will not supply the place of a specific bill of exceptions. *Gaston v. State*, 143.

8. Acceptance of service of a subpoena on the morning of the trial by a witness who resided eleven distant from the court-house, is not such diligence as, in the event of the non-attendance of the witness, will authorize a continuance. See the opinion with respect to the service of subpoena by acceptance. *Id.*

9. Application for a continuance was filed on September 19th, and recited the presence under subpoena of the witness at the previous term of court and his subsequent temporary departure from the State, and alleged that on the 18th of September defendant "asked" for an attachment for the witness. *Held*, that a total want of diligence is manifest, and the continuance was properly refused. *Lowe v. State*, 253.

CONVICTS.

See **COUNTY CONVICTS.**

MISDEMEANORS, 1.

COUNTY CONVICTS.

In 1877 the appellant was convicted of misdemeanor and adjudged to pay a fine and costs amounting to about fifty dollars. Failing to pay he was hired out as provided by law, and the hirer gave bond to the county judge for payment of two dollars per month for the ser-

COUNTY CONVICTS — continued.

vices of appellant until the fine and costs should be paid thereby. This contract was never annulled, but, after the lapse of more than four years, the fine and costs being unpaid by the hirer and his bond found worthless, a *capias pro fine* was issued and the appellant taken and detained by virtue thereof. Thereupon he sued out *habeas corpus* to the County Court, and on the hearing thereof the hirer was allowed to testify, over objection by the appellant, that he hired appellant for only two months. The County Court remanded the appellant into custody until the fine and costs should be fully paid; and from this judgment he appeals. *Held*, that the trial court erred in admitting parol evidence contrary to the conditions of the bond, and erred in not discharging the appellant from custody. Whatever may be the liability of the hirer, and notwithstanding the worthlessness of his bond, the fine and costs are settled so far as the appellant is concerned, and he is no longer liable for their payment. *Ex parte Price*, 538.

CUMULATIVE PENALTIES.

See PENALTY, 8.

DECLARATIONS.

See EVIDENCE, 7, 8.

DEPOSITIONS.

See AFFIDAVIT, 2.

D.

DISORDERLY HOUSE.

Evidence of a single witness that he had had sexual intercourse with the daughters of the defendant several times, but never at her house, is insufficient to sustain a conviction for keeping a disorderly house for the purpose of public prostitution. *Smalley v. State*, 147.

DISQUALIFICATION OF JUDGE.

1. The Code of Procedure enacts that no judge shall "sit in any case" where he is the party injured, has been of counsel, or is connected with the accused or the party injured within the third degree of consanguinity or affinity. This provision disables a judge not only from trying a cause in which he is thus disqualified but from making any order in it. On the other hand, if the judge of the forum is not thus disqualified he cannot recuse himself, nor, by certifying that he is disqualified, enable the governor to appoint a special judge to try the cause. *Reed v. State*, 587.

2. Appellant and one S. were jointly indicted for murder, but the latter was never arrested. The judge of the forum, though in no degree connected with the appellant, was related to 3. by a disqualifying consanguinity, and therefore entered an order purporting to recuse himself from trying the appellant, and the governor appointed

DISQUALIFICATION OF JUDGE—continued.

a special judge to try the cause. Appellant filed a special plea alleging that the regular judge of the forum was not disqualified to try him, and that the special judge was not legally authorized to do so; to which plea a demurrer was sustained. *Held* error. The plea was a good one to the jurisdiction of the court. Otherwise, however, if appellant and S. had been jointly on trial. *Id.*

DISTURBING RELIGIOUS WORSHIP.

1. A prosecution for disturbing a congregation assembled for religious worship will not be sustained by proof that the congregation, though disturbed, was assembled exclusively for business purposes, even though the proceedings were opened with religious exercises. *Wood v. State*, 318.

2. See the opinion *in extenso* for evidence held insufficient to sustain a conviction, even had the information charged the proper offense. *Id.*

DRUNKENNESS.

1. In a trial for murder it was legitimate for the State to prove that the deceased, when killed, was under the influence of intoxicating liquor. *Holmes v. State*, 223.

2. In a trial for murder the defense, with reference to the question of manslaughter, asked the following instruction to the jury: "You may take into consideration the fact that the defendant was intoxicated at the time of the commission of the crime, in deciding the adequacy of the cause of the passion under which he acted, or if the cause of his passion was adequate in law to reduce the crime from murder in the second degree to manslaughter." *Held*, properly refused by the court below because incorrect as a legal proposition. The ebriety or inebriety of the slayer cannot affect the existence or non-existence of the "adequate cause" without which there can be no manslaughter. *Gaitan v. State*, 544.

DYING DECLARATIONS.

See MURDER.

E.

EMBEZZLEMENT.

1. The Revised Code of Procedure (article 714) not only re-enacts the provision of the original Code which made the offense of theft to include all unlawful acquisitions of personal property punishable by the Penal Code, but so enlarges the offense of theft as to include within it the offense of swindling and embezzlement. Therefore, under an ordinary indictment for theft a conviction may be had for embezzlement, provided the offense was committed since the Revised Codes took effect. *Whitworth v. State*, 414.

EMBEZZLEMENT — continued.

2. Said article 714 of the Revised Code of Procedure is not violative of the constitutional guaranty that a party "shall have the right to demand the nature and cause of the accusation against him." *Id.*

3. On the trial of the appellant under an indictment which in ordinary form charged theft of money from one J. in the year 1880, the State offered proof that appellant was a clerk of J., and in that capacity obtained possession of the money. The defense objected that the indictment was not for embezzlement, and that it contained no allegation to which the proposed proof was relevant. *Held* that, as the offense of embezzlement is now included within that of theft, the objection was correctly overruled. *Id.*

4. In the state of case above indicated it was correct for the court, in its charge to the jury, to withdraw from them the issue of theft, and to submit that of embezzlement, with appropriate instructions upon the law of the latter offense. *Id.*

ESTRAYS.

See THEFT, 17.

EVIDENCE.

See ACCOMPLICE TESTIMONY.

CONFESSIONS.

DRUNKENNESS.

ILLEGAL MARKING, ETC.

LIMITATION.

TIME.

VARIANCE.

1. Corroboration of accomplice testimony must be effected by the evidence other than that of the accomplice himself; the facts to be corroborated must be criminative of the defendant; and the corroborative evidence must tend to connect the defendant with the offense committed. *Harper v. State*, 1.

2. In a trial for theft the principal witness against the defendant was one B., who had been previously tried on and acquitted of the same accusation. Over the defendant's objection, the State was allowed to introduce the record of B.'s acquittal. *Held*, error. *Id.*

3. At a trial for unlawfully carrying a pistol there was evidence tending to prove that the cylinder of the pistol was not attached to it nor in the defendant's possession when the State's witness saw him with the weapon. *Held*, that the trial court erred in refusing a special instruction for acquittal in case the jury so found the facts. *Cook v. State*, 19.

4. After the prosecuting counsel had concluded his opening argument to the jury, the defense offered a material witness who had not been summoned but had promised to attend. No dilatory pur-

EVIDENCE — continued.

pose or other malpractice was imputable to the defense. *Held*, that article 661 of the Code of Procedure made it incumbent on the trial court to admit the evidence, and it was error to exclude it. *Id.*

5. A legal instrument is not invalidated by the omission of a word essential to its validity if the omitted word be clearly indicated by the context. *Roberts v. State*, 28.

6. A bail bond was conditioned for the payment of "\$500 five hundred ———," and its validity is contested on the ground that it expresses no sum of money. But *held* that the dollar-mark and figures sufficiently express the amount. *Id.*

7. In the trial of several defendants jointly indicted for theft, declarations of any one of them, made when the property was first found in their possession and explanatory of their possession of it, are verbal acts and *res gestæ*, and are admissible in evidence on the trial of the defendants or any one of them. *Shelton v. State*, 36.

8. Appellant and one H. being jointly indicted for theft of an estray cow, the latter was tried first and was acquitted. At appellant's trial he proposed to prove by a third party that, when he and H. were first found in possession of the animal, H. claimed it as his property. This proof was excluded by the court below on the ground that H. had become a competent witness and his testimony the best evidence of the fact in question. *Held* error. The declaration of H. was *res gestæ*, and it was competent for appellant to prove it by any witness who heard it made. *Id.*

9. In a trial for rape the injured female was allowed, over objection by the defense, to narrate the circumstances of an assault made by the accused upon her father-in-law, when the latter came to her rescue during her struggle with the accused. *Held*, that the evidence was *res gestæ* and germane to the accusation for which the accused was on trial. *Thompson v. State*, 51.

10. The same witness was further allowed, over objection, to state the fact that her father-in-law was dead at the time of the trial. *Held*, that this fact was admissible to account for the non-production of an important witness by the prosecution. *Id.*

11. The extent of a cross-examination is a matter which must in practice be largely left to the discretion of the trial judge. The cross-examiner cannot, as a matter of legal right, require that the witness shall restate his testimony in chief. *Id.*

12. Indictment for misdemeanor charged the commission of the offense on the 18th of August, and by the clerk's indorsement on the indictment it appeared to have been filed in court on that date. But the record entry of presentments by the grand jury showed that the indictment was returned into court on the 19th of August,—a date subsequent to that on which the commission of the offense was charged. *Held*, that the record entry of presentments was admissible for the purpose of showing the true date on which the indictment was presented by the grand jury. *Kennedy v. State*, 73.

EVIDENCE — continued.

13. The prosecution was allowed to elicit from a witness the statement that the offense was committed before the presentment of the indictment. *Held*, that this was not amenable to the objection that it was the allowance of parol evidence to contradict or vary a record. *Id.*

14. The Code of Procedure, article 785, provides that husband and wife may testify for each other in all criminal actions, but that, except in a prosecution of one of them for an offense against the other, neither shall testify against the other; and this rule has been held to disqualify either as a witness against a co-defendant of the other. But if either of them be competent as a witness against the party on trial, the other is also. *Daffin v. State*, 76.

15. Objection to the competency of a witness or the admissibility of evidence should be made when the witness or evidence is offered, or as soon as the objection is ascertainable. If primarily made after verdict, such objections are not ordinarily available. *Id.*

16. Any question which may tend to affect the credit of a witness is generally allowable in his cross-examination. His relations to the accused, or bias against him, and the extent of the bias, may be developed in the cross-examination. See this case for an example. *Id.*

17. See evidence held insufficient to sustain a conviction for false imprisonment though but a nominal penalty had been imposed. *Boyd v. State*, 80.

18. When the record fails to show proof of the venue of the offense the judgment of conviction will be reversed. *Cross v. State*, 84; *Dreyer v. State*, 508.

19. If a witness implicates himself, his statement that his participation was compulsory, raises an issue of fact on the solution of which depends the question whether his testimony is or is not that of an accomplice. *Freeman v. State*, 92.

20. The ruling in *Hewitt v. State*, 10 Texas Ct. App. 501, with reference to the admissibility of evidence "necessary to the due administration of justice," cited with approval. *George v. State*, 95.

21. Clause 5, article 496 of the Penal Code declares that an assault becomes aggravated when committed by an adult male on a female or child, or by an adult female on a child. *Held*, that "adult" means a person who has attained the age of twenty-one years; and in a prosecution based on this clause the State must prove that the defendant was an adult when the assault was committed. *Id.*

22. But, under clause 6 of the same article, a male minor could, it seems, commit an aggravated assault on a female by violent familiarity with her person, against her will, with intent to have sexual knowledge of her. *Id.*

23. Appellant was indicted for offering to bribe one L., "a deputy sheriff of said county." The State having proved that L. at

EVIDENCE—continued.

the date alleged was and for some time had been acting as deputy sheriff and jailor of the county, the defense proposed but was not permitted to prove that L. had not been appointed in writing, nor sworn, nor otherwise qualified as directed by article 4520 of the Revised Statutes. *Held*, that it was sufficient for the State to prove that L. was a deputy sheriff *de facto* at the date alleged. The regularity of his appointment and qualification was not an issue in the case, and therefore the proof proposed by the defense was properly excluded. *Florez v. State*, 102.

24. The alleged object of the corrupt offer was to obtain the release of a prisoner who was in the custody of L. as jailor, and it is contended by the appellant that, inasmuch as no *mittimus* to L. was in proof, the prisoner was not legally in his custody. But *held*, that the manner in which the jailor became charged with the custody of the prisoner was a matter into which the appellant was not entitled to inquire. *Id.*

25. In a trial for theft, the alleged owner of the stolen property having testified that the defendant executed to him a bill of sale of it, the State's counsel asked him to state its contents. The defense objected, on the ground that the document itself was the best evidence of its contents. *Held*, error to overrule the objection and allow the witness to state the contents of the bill of sale. *Sager v. State*, 110.

26. Cross-examining a State's witness the defense, for the purpose of showing his *animus* or impeaching him, laid the proper predicate, and asked him if he had not told the defendant that he had been his friend but was then his enemy, and intended to have him prosecuted on the charge of theft involved in the pending trial. The State's counsel objected on the ground of irrelevancy, and the trial court sustained the objection. *Held*, error.

27. When the State has put in evidence a portion of a conversation between the defendant and another, the defense has the right to prove the whole of it on the same subject. In this case the prosecuting witness testified that on a certain occasion he accused the defendant of the theft, and the defense proposed but was not allowed to elicit the reply made by the defendant to the accusation. *Held* error; the ruling of the trial court cannot, under such circumstances, be sustained on the ground that declarations of the defendant were not evidence in his own favor. *Id.*

28. Appellant was convicted of burglary on an indictment which charged a nocturnal entry effected by fraud. The evidence relied on to prove the entry and fraud tended to show that he took off his shoes and entered through an open door, without the consent of anyone. *Held*, not sufficient evidence to prove that the entry was effected by fraud. *Hamilton v. State*, 116.

29. The intent alleged was to commit a rape by force, and the evi-

EVIDENCE — continued.

dence relied on to prove it tended to show that one of the three females in the house was awakened by something touching her foot, and, screaming, saw a man running away through an open door. *Held*, not sufficient to prove the intent alleged. *Id.*

30. The Code of Procedure, article 661, directs that testimony shall be allowed at any time before the argument is concluded, if it appear "necessary to the due administration of justice." Within the purview of this provision testimony to discredit a material witness of the adverse party, by proving his conflicting statements, may well become "necessary to a due administration of justice," even though it be cumulative; and the fact that it was not offered in its regular order is not a sufficient reason for its exclusion. *Bos-tick v. State*, 126.

31. In a trial for the theft of a horse the only evidence inculpatory of the accused was a confession imputed to him by the prosecuting witness, who, being the half-brother of the accused, justified his unnatural attitude by a desire to separate the accused from evil associates. The testimony of this witness was contradictory in various particulars of his own deposition at the examining trial, and material statements which he ascribed to the accused were inconsistent with the evidence of other witnesses. Aside from the putative confession, the only proof of the *corpus delicti* was the fact that the animal was missed from a certain field; and, on the other hand, there was proof that it was repeatedly seen on its accustomed range soon after its disappearance from the field. *Held*, that evidence proved neither the *corpus delicti* nor the culpability of the accused. Note the comments made upon it in the opinion. *Hill v. State*, 132.

32. Evidence of a single witness that he had had sexual intercourse with the daughters of the defendant several times, but never at her house, is insufficient to sustain a conviction for keeping a disorderly house for the purpose of public prostitution. *Smalley v. State*, 147.

33. The State having proved the possession by the defendant of property recently stolen, he was clearly entitled to put in evidence his explanations of his possession made at the time. See the opinion for evidence in a theft case *held* of first importance to the defense, and which should have been admitted. *Knox v. State*, 148.

34. Conspiracy to commit an offense cannot be proved by the confessions of a co-conspirator made to witnesses as to the consummation of the offense, and in the absence of the defendant. *Cohea v. State*, 153.

35. C. testified that B. confessed to him, in the absence of defendant, that he and defendant had conspired to commit the offense, and V. testified that C. repeated to him B.'s confession; after which B. was introduced by the State and testified to the conspiracy, and to

EVIDENCE — continued.

the commission of the offense in pursuance thereof. *Held*, that the evidence of C. was hearsay, and that of V. doubly so, and inadmissible because (1) conspiracy cannot be shown by the acts, declarations or confessions of a co-conspirator, but must be proved *aliunde*; and (2) because neither the acts, declarations nor confessions of a co-conspirator, done or made after the completion of the offense, are admissible. But to authorize revision by this court it must appear that objection to such proof was made when it was offered. *Id.*

86. Note the proof which, on this appeal from a capital conviction, is held insufficient to show that the killing was upon express malice. *Kemp v. State*, 174.

87. The prosecuting witness testified that the defendant told him that he "did not know, but believed that P. and C. took the animal off," and that, acting upon such information, he followed to V. county, arrested P. and recovered the stolen animal. The defendant offered to prove by the witness that he, defendant, loaned him the animal ridden in pursuit. *Held*, that the court erred in sustaining the State's objection to the evidence proposed. *Hinds v. State*, 288.

88. The State having introduced a confessed thief and an accomplice in the offense for which the defendant was on trial, the defense proposed to prove by him that he was indicted for the same offense, and, by agreement with the county attorney to dismiss the prosecution as to him, had turned State's evidence. *Held*, that such proof was competent, and its exclusion was error. *Id.*

39. E., a State's witness, testified that shortly after another certain animal was stolen, the defendant told him that he knew where some stray horses were running, and proposed to get them up and deliver them to the witness to sell, the two to divide the proceeds. The defendant proposed to prove by one W. that he, W., inquired of defendant if he knew anything of the missing animal, and that the defendant replied that he believed E. knew something of it, and that he would make a proposal to E. and get his confidence, and find out if he had such knowledge; and further, that he subsequently told W. he had made the proposal to E. but was satisfied that E. knew nothing of the horse. *Held*, first, that the defendant's objection to the evidence of E. should have been sustained; and, second, that the State being permitted to make such proof, the defendant was entitled to the evidence of W. as proposed. *Id.*

40. Evidence of a conspiracy between the defendant and others to engage generally in an enterprise of indiscriminate horse-theft, and which has a strong tendency to connect the defendant with the theft of the specific horse charged in the indictment, is admissible. The conspiracy being shown to have for its purpose the commission of offenses of a certain character, but no specific offense, the acts, declarations and conduct of each of the conspirators, if a specific offense is committed in furtherance of the general design of the

EVIDENCE—continued.

conspiracy, are evidence against each, whether or not the conspirator on trial participated in, agreed to or advised the commission of the specific offense on trial. See the opinion for the rule discussed. *Id.*

41. See the opinion for evidence held insufficient to corroborate the testimony of an accomplice. *Id.*

42. See evidence held sufficient to sustain a conviction for theft of cattle. *Love v. State*, 253.

43. Indictment laid the possession of the animal alleged to have been stolen in M. M. A. as administrator to J. T. A., deceased. In his evidence, the administrator claimed his right of possession under the inventory of the property of the estate of the deceased, filed April 15, 1878. The defendant to meet this evidence proposed to introduce the inventory and appraisement, which, upon objection by the State, was excluded. *Held*, error. *Baker v. State*, 262.

44. See the opinion for evidence, held insufficient to support a verdict of theft of a mare. *Id.*

45. The wife of the deceased was the only witness to the killing, and she was allowed, over objection by the defense, to testify that the accused, a few minutes before he shot her husband, made indecent proposals to her; but of this fact the deceased was never apprised, and nothing indicates that it influenced or explains the motives or acts of either the deceased or the defendant. *Held*, that the testimony was irrelevant and of a character likely to incense the jury against the defendant, and to deprive him of a fair trial; and objection having been duly made by the defendant (who was convicted of manslaughter), the admission of the evidence was material error. *Gardner v. State*, 265.

46. It being testified by a witness that, immediately preceding the homicide, the defendant and himself increased their speed to avoid the deceased who was in pursuit, it was proposed to prove by the witness that the defendant proposed to increase their speed in order to escape a difficulty with the deceased. *Held*, that the exclusion of this evidence was error. *Russell v. State*, 288.

47. However remote from the main issue in point of time, place, or other circumstances, a fact may be, if relevant, and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of its weight to the jury. *Id.*

48. To a prosecution for homicide the defendant interposed the plea of self-defense based upon threats made by the deceased to the defendant in person, prior to the homicide, and also upon previous difficulties between the parties. *Held*, that under such plea, the defendant, in order to show whether or not the grounds for fearing death or serious bodily harm were reasonable, was entitled to lay before the jury all circumstances which would go to show the character of the threats, the intention with which they were made,

EVIDENCE—continued.

and the grounds of fear on which the defendant acted, and hence evidence of previous affrays, difficulties, attacks and threats are admissible. *Id.*

49. Evidence of general character of the deceased as a peaceable, inoffensive man, and one not reasonably likely to execute previous threats, is available to the prosecution when the defendant seeks to justify homicide on the ground of threats, whether the defendant has or has not put the general character of the deceased in issue. *Id.*

50. The records of the court were competent evidence to show that the District Court was in session and the grand jury organized when the perjury was committed. *St. Clair v. State*, 297.

51. That the deceased had made threats against the life of the defendant will not avail as a defense to a prosecution for murder, in the absence of evidence showing hostile demonstrations by the deceased at the time of the killing. *Thomas v. State*, 315.

52. While it is true that statements of the deceased concerning previous difficulties with the defendant are not admissible as part of his dying declarations, yet it is the duty of the defense to object thereto when offered. Otherwise this court will not interfere. *Id.*

53. See evidence held sufficient to sustain a conviction for murder in the first degree. *Id.*

54. Information charged the commission of the offense on April 30, 1881. The trial was on August 3, 1881. The evidence stated the day of the offense as "April 30." *Held*, sufficient as to time, though the year was not expressly in proof. *Wood v. State*, 318.

55. A prosecution for disturbing a congregation assembled for religious worship will not be sustained by proof that the congregation, though disturbed, was assembled exclusively for business purposes, even though the proceedings were opened with religious exercises. *Id.*

56. See the opinion *in extenso* for evidence held insufficient to sustain a conviction, even had the information charged the proper offense. *Id.*

57. The principal witnesses for the State being beyond the jurisdiction of the court, the county attorney made affidavit to that fact and introduced their written testimony taken before an examining court. In order to impeach this testimony by showing contradictory statements of the witnesses, the defense sought to introduce their written declarations made before an examining court in the examination of two co-defendants, charged separately with the same offense. *Held*, that the proposed evidence was properly excluded. *Ballinger v. State*, 323.

58. Acts or admissions or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent as evidence to show malice. The bill of exceptions in this case does not

EVIDENCE — continued.

present the objection to the admission of the declarations of the defendant in such manner that they can be held irrelevant. *Garza v. State*, 845.

59. An essential element of the offense of swindling is that the party injured, in parting with his property, actually relied upon and was deceived by the fraudulent representations or devices of the party accused. *Buckalew v. State*, 852.

60. The Code of Procedure, article 750, expressly inhibits proof of extrajudicial confessions by an unwarned prisoner unless, in connection therewith, he stated facts or circumstances that are found to be true, and which conduce to establish his guilt. If the inculpatory circumstances disclosed by the prisoner are proved to be true, what he said in disclosing them is admissible against him for the purpose of explaining the disclosures themselves. But the truth of the inculpatory circumstances must be shown by evidence *aliunde* the statement of the prisoner. *Kennon v. State*, 856.

61. If it be proposed to contradict the testimony of a witness by his deposition taken before an examining court, it is necessary to show him his signature to the deposition, and so much of its contents as involves the statements sought to be impeached. A question which directed the attention of the witness to the "examining trial in this case" sufficiently laid the predicate as to time and place. *Grosse v. State*, 864.

62. It was not necessary to ask the witness if his deposition was read over to him in the examining court. The fact, however, that it was not read over to him might be elicited as a circumstance tending to account for discrepancies between it and his testimony at the final trial of the case. *Id.*

63. If the deposition itself is to be used for the purpose of contradicting the witness, it must be shown that he subscribed it or put his mark to it. But if the deposition was inadmissible because not signed or not authenticated, it was competent to contradict the witness by oral proof of his conflicting statements in the examining court, if they were of a material nature. *Id.*

64. The Code of Procedure, art. 661, expressly provides that evidence necessary to the due administration of justice may be introduced at any time before the argument of the cause is concluded. This provision applies as well to the predicate for the proposed evidence as to the evidence itself. *Id.*

65. In the cross-examination of the prosecuting witness the defense laid no predicate to contradict his testimony by proof of his prior statements conflicting with it, but, after the State had closed its evidence, proposed to recall the witness for that purpose, and then contradict his testimony in chief by his deposition at the examining trial of the cause. *Held*, error to disallow the recall of the witness,—no ill-faith or sharp practice being imputable to the

EVIDENCE — continued.

failure to lay the predicate in the course of the cross-examination. *Id.*

66. While the defendant was in a bar-room violating a city ordinance, the marshal of the city was notified, and summoned a *posse* and confined the defendant in a neighboring crib. *Held*, that notwithstanding the marshal's testimony that he did not "consider" that he had the defendant under arrest, the arrest was complete, and statements made by the defendant under such circumstances were not admissible as evidence against him. *Id.*

67. See this case for circumstances under which it was proper for the court to admit evidence of the defendant's possession of other animal animals at the time he was found in possession of the animal charged to be stolen, but whereunder the court should have explained the legal effect of such evidence. *Long v. State*, 381.

68. Evidence that a third party, at a given time and place, but not in the hearing of the defendant, told the witness that one of the men in charge of a drove of cattle "was a Tyler" (defendant's patronymic), was hearsay and not admissible. If the third party had spoken to defendant by name or called him by name, and had been heard by the defendant, a different rule might apply. *Tyler v. State*, 388.

69. A witness cannot, it seems, be permitted to testify as an expert as to the length of time which would be required to gather a certain number of cattle within the limits of a given "range." He may testify, however, as to the topography of the country, the number of cattle frequenting it, and whether they were wild or gentle, leaving the question of time to the jury for determination. *Id.*

70. The witness on the stand manifesting no disposition to evade frank, plain and pertinent answers to questions propounded, the fact that he was related to a co-defendant, who was not on trial, did not authorize the prosecuting attorney to propound leading questions. *Conn v. State*, 390.

71. See evidence *held* insufficient to sustain a conviction for theft. *Id.*

72. It was in proof that the defendant, when found in possession of the stolen property, claimed possession by virtue of the consent of the owners' agent. *Held*, that it being shown that the agent was accessible at the time of the trial, and want of his consent not being in proof, he should have been produced by the State to negative, if he could, the statement of the accused. *Powell v. State*, 401.

73. On the trial of the appellant under an indictment which in ordinary form charged theft of money from one J. in the year 1880, the State offered proof that appellant was a clerk of J., and in that capacity obtained possession of the money. The defense objected that the indictment was not for embezzlement, and that it contained

EVIDENCE — continued.

no allegation to which the proposed proof was relevant. *Held*, that as the offense of embezzlement is now included within that of theft, the objection was correctly overruled. *Whitworth v. State*, 414.

74. Indictment charged that the defendants did, "acting together and with each other, unlawfully sell intoxicating liquors to A. J. Dawson, without having obtained license therefor." *Held*, a good indictment under the act of 1881, "to prescribe the requisites of indictments in certain cases." A sale of any quantity might be proved by the State, to establish the offense. *White v. State*, 476.

75. At the trial of merchants on an indictment which charged the sale of liquor to one D., the proof showed that the sale to D. was made by a clerk of the defendants in their absence, but failed to show their complicity in the sale. *Held*, that it was error to allow the State, over objections by the defense, to prove that the clerk also sold liquor to others beside D., in the absence of the defendants. *Id.*

76. In a trial for murder it appeared that B., a State's witness, at the time of the homicide lived in the locality where it was committed, but that he had been living in an adjoining county for two or three years before the trial. Assailing his general reputation for truth, the defense asked the impeaching witnesses if they knew what that reputation was when he lived where the homicide was committed. On objection by the State the trial court disallowed the question, and ruled that the inquiry should be restricted to the time of the trial. *Held*, that the question was a proper one, and the ruling erroneous. The presumption in favor of the continuance of an established *status* obtains with regard to a witness's reputation for truth, notwithstanding the lapse of three years. *Lum v. State*, 488.

77. To warrant a conviction for murder of the first degree, it is incumbent on the State to prove that the killing was done on express malice, and with a sedate, deliberate mind and formed design; but nevertheless a homicide may be murder of the first degree although the result of the sudden execution of an immediate resolve to kill or to inflict serious bodily injury which may result in death, and in such cases the *indicia* of express malice may be evidenced by the cool, calm and circumspect deportment of the slayer at the time of the fatal act, and immediately anterior and subsequent thereto,—by the absence of a provocation or exciting cause,—by the nature of the fatal act itself, and the character of instrument used, as well as the manner of its use,—by declarations indicative of the state of mind or the motives of the slayer,—or by other evidential circumstances pertinent to the issue. *Gaitan v. State*, 544.

78. There is an established distinction between the competency as evidence of acts done and confessions made by a defendant in ar-

EVIDENCE—continued.

rest. The former are admissible, but the latter, unless clearly within the provisions of the statute, are not admissible. *Rhodes v. State*, 563.

79. When the possession of recently stolen property is relied on as inculpatory of the accused, his explanation thereof is admissible in his behalf though given after he had parted with the possession, provided it was given on the first occasion for any explanation by him. It is not material that the first occasion did not present itself until three or four weeks after he had parted with the possession. *Anderson v. State*, 576.

80. In the trial of appellant for the forgery of a deed purporting to have been signed by one Gritten, it was not error to allow the State to put in evidence, for comparison with the signature alleged to have been forged, certain signatures which purported to be those of Gritten to documents shown to be archives of the General Land Office. *Rogers v. State*, 608.

81. Nor was it error to admit as evidence for the State an original entry in a record-book of the General Land Office, for the purpose of showing that the land-agency firm of which the defendant was a member made application (anterior to the alleged date of the forgery) for a copy of the original title granted to Gritten. It was not incumbent on the State to confront the defendant with the person who made the original entry upon the record-book. (Hurt, J., dissenting.) *Id.*

82. It is not necessary that the other evidence shall corroborate that of the accomplice as to any particular statement made by him; but, whatever the amount of the corroborative evidence, it does not avail unless it tends to connect the defendant with the offense committed. *Cohea v. State*, 622.

83. The Revised Statutes, in article 4566, require every owner of cattle, hogs, sheep, or goats to have a distinctive ear-mark and brand, and to have the same recorded; and article 4561 provides that unrecorded brands shall not be evidence of the ownership of cattle, horses, or mules. *Held*, that this latter provision does not apply to unrecorded marks. *Quere*, whether it uses the word *cattle* in a sense to comprehend sheep. *Dreyer v. State*, 631.

84. The prosecuting attorney was permitted, over objection by the defense, to testify that while the defendant was on bail, and during the previous trial of one O. for the same theft, he (the prosecuting attorney), with a view of using the present defendant as a witness, inquired of him whether the person who was on trial at the time was O., and the defendant replied that said person was not O., but was one M., whom he knew; and the defendant was consequently not used as a witness against O. The defense objected that the defendant was in duress and uncautioned when he made the reply to the witness, and that the latter could not fairly reproduce the reply to

EVIDENCE — continued.

the prejudice of the defendant. *Held*, that the objections were untenable, and, under the circumstances, the testimony was not improper. *Id.*

EXPERTS.

See WITNESS, 7.

EXTRA-TERRITORIAL OFFENSES.

The Penal Code, articles 798-9, makes provision for the punishment of robbery, theft, and the knowingly receiving of stolen property, though perpetrated in a foreign country, if the property was brought into this State; provided that by the law of the foreign country the inculpatory act would have been the offense charged in the indictment. *Held*, that the law of the foreign country is an issuable fact in such cases, and should therefore be alleged in the indictment. *Carmisales v. State*, 474.

F.

FACT CASES.

1. See evidence held sufficient to sustain a conviction for aggravated assault and battery committed by unwarranted approaches to a woman. *Harper v. State*, 1.

2. Evidence held insufficient to prove the intent to defraud in a trial for illegally marking cattle. *Fossett v. State*, 40.

3. Evidence held insufficient to sustain a conviction for false imprisonment. *Boyd v. State*, 80.

4. Evidence held insufficient in a murder case to prove express malice. *Kemp v. State*, 174.

5. Evidence which, in a trial for murder, required the law of manslaughter to be given in charge to the jury. *Holmes v. State*, 223.

6. Evidence in a trial for theft held insufficient to corroborate an accomplice witness. *Hinds v. State*, 238.

7. Evidence held sufficient to sustain a conviction for theft. *Lowe v. State*, 253; *Rhodes v. State*, 563.

8. Evidence held insufficient to sustain a conviction for theft. *Winn v. State*, 304; *Conn v. State*, 390.

9. Evidence held sufficient to sustain a conviction for murder in the first degree. *Thomas v. State*, 315; *Gaitan v. State*, 544.

10. See evidence held insufficient to sustain a conviction for fornication. *Cohen v. State*, 337.

11. See evidence in a murder case held sufficient to identify the body of the deceased, and note a state of proof held not to necessitate instructions to the jury on the law of manslaughter. *Lum v. State*, 483.

12. Evidence in a trial for burglary held insufficient to corroborate an accomplice witness. *Cohea v. State*, 622.

FALSE IMPRISONMENT.

See evidence *held* insufficient to sustain a conviction for false imprisonment though but a nominal penalty had been imposed. *Boyd v. State*, 80.

FALSE PRETENSE.

See SWINDLING.

False pretense, in order to authorize an indictment for swindling, need not be such an artificial device as will impose upon a man of ordinary prudence and caution, nor need it be such as cannot be guarded against by ordinary caution. But if the pretense was absurd or irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, he could not have believed it or been deceived by it, and the pretense is not within the purview of the definition of swindling. *Buckalew v. State*, 352.

FORGERY.

1. In the trial of appellant for the forgery of a deed purporting to have been signed by one Gritten, it was not error to allow the State to put in evidence, for comparison with the signature alleged to have been forged, certain signatures which purported to be those of Gritten to documents shown to be archives of the General Land Office. *Rogers v. State*, 608.

2. Nor was it error to admit as evidence for the State an original entry in a record-book of the General Land Office, for the purpose of showing that the land-agency firm of which the defendant was a member made application (anterior to the alleged date of the forgery) for a copy of the original title granted to Gritten. It was not incumbent on the State to confront the defendant with the person who made the original entry upon the record-book. (Hurt, J., dissenting.) *Id.*

3. The jurisdictional rulings in the case of *Rogers, Ex parte*, 10 Texas Ct. App. 655, reconsidered and maintained,— which rulings assert the amenability in Texas of a party who here consents with and aids his accomplice to fabricate in another State a deed purporting to convey land within this State. *Id.*

FORNICATION.

1. See evidence *held* insufficient to sustain a conviction for fornication. *Cohen v. State*, 337.

2. In a trial for fornication the court charged the jury that "every person is presumed to be innocent until his or their guilt is established by legal testimony; but if the proof in cases like this shows that the defendants did live and sleep together in the same room, and had for a series of months, it is strong evidence against the accused." *Held*, that this was a flagrant charge upon the weight of the evidence, and is error for which this court has no option but to reverse. *Hill v. State*, 379.

H.

HABEAS CORPUS.

See COUNTY CONVICTS.

1. In this State it is well settled that a prisoner held in custody under judicial proceedings which, though voidable, are not void, cannot obtain relief by *habeas corpus*. *Boland, Ex parte*, 159.

2. The writ of *habeas corpus* does not operate as a writ of error, a *certiorari*, or an appeal. If, as in the present case, the relator is in custody under a *capias pro fine*, the judgment imposing the fine can be revised on *habeas corpus* no further than to determine whether the court *a quo* had jurisdiction to render it. Mere error in the judgment is not remediable by *habeas corpus*, even when, as in the present case, no appeal will lie to the judgment. *Quære*: What presumptions obtain in this State in favor of proceedings had in courts of justices of the peace, mayors and recorders? *Id*.

HOMICIDE.

See MALICE.

MANSLAUGHTER.

MURDER.

SELF-DEFENSE.

1. Article 612 of the Penal Code provides: "That the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed unless from the manner in which it was used such intention evidently appears." *Hill v. State*, 456.

2. Article 618 of the Penal Code provides that "if any injury be afflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing will be manslaughter or murder according to the facts of the case." Articles 612 and 618 apply to cases where *intent* to kill evidently appears, or where such intent is evidenced by the cruelty of the manner in which the injury was inflicted. *Id*.

3. Article 614 of the Penal Code embodies the law of a case in which there was no intention to kill, and when the homicidal act was divested of the elements of an evil and cruel disposition. Under it the person offending may be prosecuted and convicted of any grade of assault and battery. Note the state of proof held in this case to necessitate a charge to the jury embodying the law as enacted in said article 614. *Id*.

IDEM SONANS.

See RETAILING, 1.

I.

ILLEGAL MARKING OR BRANDING.

See MARKS AND BRANDS.

1. To constitute the offense of illegal marking or branding it is not sufficient that the accused marked or branded an animal not his own, without the consent of the owner. The intent to defraud is an essential ingredient of the offense, and must be established by evidence either affirmative or negative. It cannot be inferred from the naked fact that the accused marked or branded an animal not his own, without the owner's consent. See evidence *held* insufficient to establish the intent to defraud. *Fossett v. State*, 40.

2. Indictment for unlawfully branding a colt, with intent to defraud, was excepted to because it did not further describe the colt as an animal of the horse species. *Held*, that the exception was correctly overruled. *Pullen v. State*, 89.

IMPEACHMENT OF WITNESS.

See WITNESS.

INCEST.

At the appellant's trial for incest with his step-daughter she was the principal witness for the State, and portions of her testimony tended to inculcate herself. *Held*, that the trial court should have given in charge to the jury the statutory provisions controlling accomplice testimony and its corroboration. *Freeman v. State*, 92.

INDICTMENT.

See EMBEZZLEMENT, 1.

INFORMATIONS.

1. Indictment for misdemeanor charged the commission of the offense on the 18th of August, and by the clerk's indorsement on the indictment it appeared to have been filed in court on that date. But the record entry of presentments by the grand jury showed that the indictment was returned into court on the 19th of August,—a date subsequent to that on which the commission of the offense was charged. *Held*, that the record entry of presentments was admissible for the purpose of showing the true date on which the indictment was presented by the grand jury. *Kennedy v. State*, 78.

2. The prosecution was allowed to elicit from a witness the statement that the offense was committed before the presentment of the indictment. *Held*, that this was not amenable to the objection that it was the allowance of parol evidence to contradict or vary a record. *Id.*

3. Indictment for unlawfully branding a colt, with intent to defraud, was excepted to because it did not further describe the colt as an animal of the horse species. *Held*, that the exception was correctly overruled. *Pullen v. State*, 89.

INDICTMENT—continued.

4. To an indictment for unlawfully selling liquor exception was taken because the word *drink* was written "dring," and the word *spirituous* was written "spiritous." *Held*, with respect to the former mistake that it is cured by the context and the word itself is surplusage; and that, with respect to the latter, the error in the spelling does not vitiate and the principle of *idem sonans* applies. *Brumley v. State*, 114.

5. If one person has the ownership of the property and another has the possession, charge, or control of it, the ownership may be alleged in either. *Hill v. State*, 132.

6. Objection that the minutes of the court fail to show that the indictment was presented by a grand jury of the proper county must be made before verdict. *Bailey v. State*, 140.

7. The Code of Procedure, article 794, provides that "when money, property, or other articles of value enumerated in the definition of swindling are obtained in such manner as to come within the meaning of theft or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines such other offense." *Held*, that the effect of this provision is to invalidate an indictment for swindling if the allegations thereof charge facts which constitute a different offense. *Hirshfeld v. State*, 207.

8. Appellant was prosecuted and convicted for swindling. The gravamen of the accusation was the procurement of money by means of a forged indorsement on his own check, and the indictment, though obviously framed on the definition of swindling, charged all the constituents of knowingly uttering a forged instrument; wherefore the defense excepted to it because, under the operation of article 794 of the Code of Procedure, the offense charged was not swindling but the uttering of a forged instrument. *Held*, that the exception was well taken and should have been sustained. *Id.*

9. Though one who takes up and holds an estray in conformity with the estray laws acquires such a special property in the animal as that an indictment for theft of it may allege the ownership in him, a mere partial compliance with the estray laws, such as preliminary advertisement, manifesting an intention to estray, does not confer either right of possession or special property, and an indictment that alleges the ownership in an unknown person is sufficient. *Lowe v. State*, 253.

10. Objections to an indictment for perjury before a grand jury were: 1, because it did not show by direct affirmative allegation that the District Court was in session at the time of the alleged offense; 2, it did not show the organization of the grand jury; 3, it did not show the appointment of A. as foreman of the grand jury; 4, it

INDICTMENT — continued.

did not allege that the said grand jury was in session when the oath was administered by A., nor when the alleged statements were made. *Held*, that the indictment, notwithstanding, is sufficient to charge the offense. *St. Clair v. State*, 297.

11. Indictment for rape charged an assault upon the female with intent to ravish and carnally know her, and alleged that the accused obtained carnal knowledge of her without her consent and against her will. *Held*, not a good indictment to charge a rape by force, because it neither alleges that the accused obtained the carnal knowledge by force, nor that he ravished the female. *Elschlep v. State*, 301.

12. The enactment of March 26, 1881, commonly called the "Common-Sense Indictment Act," dispenses, in indictments for swindling, with the previously required averments of the falsity of the pretenses and the guilty knowledge of the accused. Therefore, those averments are not necessary in an indictment for swindling presented since that act took effect. *Arnold v. State*, 472.

13. The "Common-Sense" Indictment Act is not retroactive, and does not cure defects in indictments which were presented prior to the time when said enactment took effect. *Id.*

14. The Penal Code, articles 798-9, makes provision for the punishment of robbery, theft, and the knowingly receiving of stolen property, though perpetrated in a foreign country, if the property was brought into this State; provided that by the law of the foreign country the inculpatory act would have been the offense charged in the indictment. *Held*, that the law of the foreign country is an issuable fact in such cases, and should therefore be alleged in the indictment. *Carmisales v. State*, 474.

15. The principal change effected in indictments by the act of March 26, 1881, "to prescribe the requisites of indictments in certain cases," is to obviate the requirement of circumstantial allegations. It does not affect the evidence necessary to establish the inculpatory facts. *White v. State*, 476.

16. Indictments presented prior to the time when the Common-Sense Indictment Act of 1881 took effect cannot be tested by that enactment. *Eppstein v. State*, 480.

17. The charging part of an indictment filed June 23, 1881, alleged that the accused pursued the "occupation of a wholesale liquor dealer, and did then and there sell spirituous, vinous and other intoxicating liquors in quantities of five gallons and more than that amount, without first obtaining license therefor by payment of the State tax fixed by law upon said occupation; against," etc. *Held*, that the indictment was fatally defective under the law in force when it was presented. And even under the Common-Sense Indictment Act it would be insufficient because it fails to allege the name of the person to whom the sale was made. *Id.*

INDICTMENT—continued.

18. Being found guilty of murder the defendant moved in arrest of judgment because the indictment charged one G. as well as himself with the crime, and then stated that it was not intended thereby to charge the said G., inasmuch as he was separately indicted for the same offense. *Held*, that as the indictment was good so far as appellant was concerned, his motion in arrest was properly overruled. *Lum v. State*, 483.

19. Indictment for theft of cattle alleged the ownership to be in one B. The proof showed that the cattle belonged to the estate of the deceased father of B., but that B. had the charge and control of them. *Held*, under article 426 of the Code of Procedure, that the ownership was well alleged in B., and that the proof was germane to the allegation. *Dreyer v. State*, 503.

20. See an indictment for swindling which is held insufficient under the law as it was prior to the enactment of March 26, 1881, entitled "An act to prescribe the requisites of indictments in certain cases," but commonly known as the "Common-Sense Indictment Act." It seems that even under the said act of 1881, an indictment for swindling is bad unless it alleges that the defendant obtained the property *by means* of the false representations; and that an averment that the person swindled believed the false representations and by reason thereof parted with his property to the defendant is not tantamount to the allegation that the defendant obtained the property by means of the representations. *Ervin v. State*, 536.

21. The authenticity of a substitute indictment cannot be rested on presumption, nor on mere inference from a record-recital that, the original indictment being lost, the court granted leave to substitute it with a copy inspected by the court. The record must affirmatively verify it as a fact that the substitution was actually made. *Rogers v. State*, 608.

INFORMATIONS.

See AFFIDAVIT.

INDICTMENT.

MISDEMEANORS.

1. The particularity requisite in an information is not necessary in the affidavit on which it is founded, nor are discrepancies between them of any consequence provided there is accordance in substance. They should agree as to the time and venue of the offense and the names of the defendant and the injured party, and there should be substantial conformity in their allegations descriptive of the offense. *Cole v. State*, 67.

2. An information for aggravated assault and battery was founded on an affidavit which, after charging an aggravated assault, alleged specific acts of personal violence. *Held*, that there is no variance between the information and the affidavit. *Id.*

INFORMATIONS — continued.

3. Information against one party for "loud and vociferous talking and assault" upon another may be based upon an affidavit which charged both the accused and the other with loud and vociferous talking and with assault upon each other. *Wood v. State*, 318.

4. The Code of Procedure, article 431, enacts that no information shall be presented until oath in writing has been made by some credible person charging the defendant with an offense. No form for the affidavit is prescribed, and substantial compliance with the provisions of the Code is sufficient. *Brown v. State*, 351.

5. To an affidavit for an information it is objected that the commission of the inculpatory act is not alleged positively, but only to "the best of the knowledge and belief" of the affiant. *Held*, that the allegation is sufficient, and the objection not tenable. *Id.*

6. No offense is charged by an information which, without itself alleging the inculpatory act, refers to the "affidavit which is herewith filed and shows" the commission of the act by the accused. *Id.*

7. Amendment of formal defects in an information is allowable, but not of substantial defects. *Id.*

8. *Quære*. Whether the substance of an information can be amended by consent of the parties,—the Code of Procedure, article 550, providing that "No matter of substance can be amended." *Id.*

INTENT.

See MALICE.

1. To constitute the offense of illegal marking or branding it is not sufficient that the accused marked or branded an animal not his own, without the consent of the owner. The intent to defraud is an essential ingredient of the offense, and must be established by evidence either affirmative or negative. It cannot be inferred from the naked fact that the accused marked or branded an animal not his own, without the owner's consent. See evidence held insufficient to establish the intent to defraud. *Fossett v. State*, 40.

2. In the absence of a fraudulent intent in the taking of the property of another, such taking constitutes a mere trespass upon property, and when the jury may infer from the evidence that the taking was not fraudulent, the accused is entitled to an instruction to the jury as to the distinction between trespass and theft. *Ainsworth v. State*, 339.

3. That the accused knew that the property taken was not his own, and that it was taken to deprive the true owner of it, is an essential element of the crime of theft; and one usually evidenced by a taking in such a manner and under such circumstances as to avoid detection or responsibility. See evidence held insufficient to disclose a criminal intent. *Id.*

4. M., a merchant, sold two coats and a vest to be delivered hereafter, and for keeping placed the articles in a trunk in his store. A

INTENT — continued.

day or two subsequently his clerk sold the trunk to the defendant, neither of them examining it, and both ignorant of its contents. The defendant took the trunk home and there discovered its contents, which he did not return, but retained. On the trial, it was insisted for the defense, that, in order to convict for the theft of the coats and vest, the intent to appropriate them must have existed at the time the trunk was delivered and received. But *held*, that if the criminal intent was formed at the time of the discovery of the goods, their appropriation was theft. *Robinson v. State*, 403.

5. See the opinion for a charge of the court applicable to the principle, and for charges properly refused as repugnant thereto. *Id.*

INTERPRETATION OF THE CODES.

See CARRYING WEAPONS, 2.

DISQUALIFICATION OF JUDGE.

MARKS AND BRANDS.

TAXATION.

1. The Penal Code, article 704, makes it burglary to enter a house at night by force, threats or fraud, with intent to commit felony or theft, and further provides (in article 706) that the entry into a house, within the meaning of article 704, "includes every kind of entry but one made by the free consent of the occupant," etc. *Held*, that this latter provision is not to be so construed as to eliminate from the definition of the offense the element of "force, threats, or fraud," nor to dispense with the necessity of alleging and proving that the entry was effected by some one or more of those modes. It does not suffice, therefore, to allege and prove an entry made without the consent of the occupant or of some one authorized to give consent; but some one of the statutory modes of entry, as well as the fact of entry, must be alleged and proved in order to constitute the offense. Note in the opinion a collocation of the articles of the Penal Code which affect this question, and the elucidation of their import and interdependence. *Hamilton v. State*, 116.

2. Article 8 of the Revised Penal Code amends the corresponding article of the original Code, and permits an act or omission to be "made a penal offense" without being "expressly defined." *Robinson v. State*, 309.

J.

JEOPARDY.

1. Pendency of other indictments for the same charge is not jeopardy, nor is it in any way available to the accused until he has been put in jeopardy under one of them. He cannot require that the State elect upon which of the indictments it will proceed. *Bailey v. State*, 140.

JEOPARDY — continued.

2. Section 14, article 1, of the State Constitution ordains that "No person, for the same offense, shall be twice put in jeopardy of life or liberty." *Held*, that the term "same offense" as here used does not signify the same offense *eo nomine*, but the same criminal act or omission. See the opinion *in extenso* on the subject of jeopardy. *Hirshfeld v. State*, 207.

JUDGMENT.

1. For the requisites of a final judgment in a criminal case, see the opinion of the court. *Pennington v. State*, 281.

2. The requisite of a final judgment of conviction prescribed in the ninth clause of article 791, Code of Procedure, to wit, that the defendant "is adjudged to be guilty of the offense as found by the jury," has special if not exclusive application to felony cases. It does not apply to a misdemeanor conviction in which the punishment assessed is only a pecuniary fine, because article 805 of the same Code enacts that in such a case the judgment of conviction shall be that the State "recover of the defendant the amount of such fine and all costs of the prosecution," etc. *Hill v. State*, 379.

JURISDICTION.

See PRACTICE, 26.

1. The District Court has no authority to transfer a felony case to the County Court; and therefore an order purporting to make such a transfer is a nullity, and does not divest the jurisdiction of the District Court. No order of the County Court to retransfer the case is requisite. *Fossett v. State*, 40.

2. When, because of the disqualification of a county judge to try a misdemeanor case, it is transferred to the District Court, the jurisdiction of the District Court attaches as amply as if it was original and exclusive; and if the district judge also is disqualified in the case, a special district judge must be chosen or appointed as provided by law, and his election or appointment be made matter of record, and, in the event of an appeal, be brought up in the transcript. The special district judge is empowered to try or dispose of the cause in the District Court, but has no authority to transfer it back to the County Court for trial, even though a new county judge, not disqualified in the case, has acceded to the bench of that court; and therefore such a retransfer to the County Court cannot invest it with jurisdiction over the cause. See the opinion *in extenso*. *Snow v. State*, 99.

3. If the court before which the principal obligor is bound to appear has no authority to require him to answer the charge against him, it has no power to adjudge a forfeiture of his bail-bond. See the opinion *in extenso* on this subject. *McGee v. State*, 520.

4. The Code of Procedure enacts that no judge shall "sit in any case" where he is the party injured, has been of counsel, or is con-

JURISDICTION — continued.

nected with the accused or the party injured within the third degree of consanguinity or affinity. This provision disables a judge not only from trying a cause in which he is thus disqualified but from making any order in it. On the other hand, if the judge of the forum is not thus disqualified he cannot recuse himself, nor, by certifying that he is disqualified, enable the governor to appoint a special judge to try the cause. *Reed v. State*, 587.

5. The jurisdictional rulings in the case of *Rogers, Ex parte*, 10 Texas Ct. App. 655, reconsidered and maintained,— which rulings assert the amenability in Texas of a party who here consents with and aids his accomplice to fabricate in another State a deed purporting to convey land within this State. *Rogers v. State*, 608.

JURORS AND JURY.

1. Challenge to the array or to any member of a grand jury is authorized by the Code of Procedure, but it defines the only causes for challenge and explicitly requires the challenge to be made before the grand jury is impaneled,— securing to a prisoner in the county jail the right, upon his request, to be brought into court to make the challenge. *Held*, that by these provisions the right to impeach the qualifications or the legality of a grand jury is limited to the time prescribed and confined to the causes specified; and a prisoner who has omitted to request that he be brought into court to make the challenge cannot impeach the grand jury by pleading in abatement of the indictment preferred against him. *Kemp v. State*, 174.

2. To an indictment for murder the defendant pleaded in abatement that he was in jail when the grand jury was organized; that he was a friendless minor without means to employ counsel, and had no counsel until after the indictment was presented; that he was not apprised of his right to challenge the array or any member of the grand jury; that the persons composing it were not selected for the term by the jury commissioners, nor was the list of them certified by the commissioners as required by law; that the envelope containing the list was not properly indorsed, and was opened by the clerk before he was authorized by law to open it; that the grand jurors were summoned by an unauthorized person, and that one of them was a principal witness against the defendant. *Held*, that the plea was properly overruled. See the opinion for a collocation of the articles of the Code of Procedure which control the subject. *Id.*

3. The jury in this case returned their verdict in the absence of the defendant, and separated. The court, discovering the absence of the defendant, and having retained possession of the verdict, called the jury together, and had the verdict read in the presence of the defendant. *Held*, that such irregularity of practice constitutes no ground for reversal. *Russell v. State*, 238.

4. If the defendant had not exhausted his peremptory challenges when the panel was filled, it is not material on appeal that his

JURORS AND JURY—continued.

challenges for cause were erroneously overruled by the trial court. *Lum v. State*, 483.

5. On the *voir dire* of a juror he stated that he heard the evidence in the previous trial of one O. for the same offense charged against the appellant, and had formed the opinion that O. was guilty, but had formed no opinion as to the guilt or innocence of appellant. The defense challenged the juror for cause, but the trial court overruled the challenge, and, the peremptory challenges of the defense being exhausted, the juror was put on the panel which convicted the appellant. The defense reserved a bill of exceptions, but it does not manifest that the evidence in O.'s case was the same as that in the appellant's, nor disclose how the appellant's amenability was affected by the evidence adduced against O. *Held*, that this state of the record fails to show that the juror entertained a disqualifying opinion in this case, or that the trial court erred in impaneling him. But *held further*, that the better practice is to discharge a juror whose impartiality is questionable. *Dreyer v. State*, 631.

LAND-FORGERY.

See FORGERY.

L.

LIMITATION.

1. Though it is incumbent on the State to prove an offense not barred by limitation, yet there is no occasion to instruct the jury as to the period of limitation when nothing in the evidence raises a question whether the prosecution is barred. *Hoy v. State*, 82.

LOST PROPERTY.

See THEFT, 41.

1. Where a proprietor has sold certain goods to be delivered hereafter, and in order to separate them from bulk pending delivery, places them in a trunk, and his agent, without knowledge of its contents, subsequently sells and delivers the trunk to a third party, who, equally ignorant of the contents, receives the trunk, takes it home and finds the goods, the *status* of the goods is that of lost property, and the relation of the purchaser of the trunk to the contents is that of finder of lost or mislaid property. *Robinson v. State*, 403.

2. Lost property, like any other, may be the subject of theft. *Id.*

M.

MALICE.

See MURDER, 4.

1. Malice is an essential constituent of murder either of the first or the second degree. The homicidal act must not only be unlawful, but the slayer must be actuated by malice; and whether he was

MALICE—continued.

so actuated involves the pivotal issue in murder trials wherein the contest is between murder on the one side and manslaughter, or justifiable, excusable, or negligent homicide on the other. Without malice there can be no murder. *Holmes v. State*, 223.

2. Acts or admissions or other language of the prisoner, even after the mortal stroke or killing, may often be pertinent as evidence to show malice. *Garza v. State*, 345.

3. See the opinion in this case for facts held sufficient to show express malice, and, consequently, had death ensued, murder. See, also, rules applicable to cases of sudden killing in the absence of previous ill-feeling, etc. *Id.*

22. Charge of the court in a trial for murder, or assault with intent to murder, is deficient if it fails to define malice. *Id.*

5. When the proof shows an unlawful killing, and no evidence has been adduced which tends to show express malice on the one hand, or any justification, excuse or mitigation on the other, the law implies malice, and the offense is murder of the second degree. *Hill v. State*, 456.

6. It is not necessary that the evidence of express malice shall demonstrate it to mathematical certainty. The requisite degree of certainty is such as is reasonably sufficient to satisfy and convince the jury. *Gaitan v. State*, 544.

MANSLAUGHTER.

See DRUNKENNESS, 2.

MALICE.**MURDER.****SELF-DEFENSE.**

1. See a state of proof in a trial for murder which required the law of manslaughter to be given in charge to the jury. *Holmes v. State*, 223.

2. The wife of the deceased was the only witness to the killing, and she was allowed, over objection by the defense, to testify that the accused, a few minutes before he shot her husband, made indecent proposals to her; but of this fact the deceased was never apprised, and nothing indicates that it influenced or explains the motives or acts of either the deceased or the defendant. *Held*, that the testimony was irrelevant and of a character likely to incense the jury against the defendant, and to deprive him of a fair trial; and objection having been duly made by the defendant (who was convicted of manslaughter), the admission of the evidence was material error. *Gardner v. State*, 265.

3. Adequate cause is an essential element of the offense of manslaughter. In the absence of evidence tending to show the existence of adequate cause, the court did not err in refusing a charge upon manslaughter. *Hill v. State*, 456.

MANSLAUGHTER—continued.

4. The amenability of a person charged with crime is conditioned solely on his own acts, and is never dependent upon the immunity of the injured person in case the result had been different. Therefore, though the Penal Code justifies the husband in slaying a person when taken in the act of adultery with the wife, it does not follow that the adulterer is guilty of murder if, being attacked by the husband, he kills him to save his own life. Under such circumstances manslaughter would be the maximum of culpability. *Reed v. State*, 509.

MARKS AND BRANDS.

See **ILLEGAL MARKING OR BRANDING.**

The Revised Statutes, in article 4566, require every owner of cattle, hogs, sheep or goats to have a distinctive ear-mark and brand, and to have the same recorded; and article 4561 provides that unrecorded brands shall not be evidence of the ownership of cattle, horses, or mules. *Held*, that this latter provision does not apply to unrecorded marks. *Quære*, whether it uses the word *cattle* in a sense to comprehend sheep. *Dreyer v. State*, 631.

MISDEMEANORS.

See **INFORMATIONS.**

1. Article 816 of the Code of Procedure enables a misdemeanor convict, by making the prescribed affidavit of insolvency, to obtain his discharge from imprisonment by working out the fine and costs adjudged against him; but a misdemeanor convict who is also detained in prison on a charge of felony cannot, by complying with the provisions of article 816, be set at liberty. The county authorities have no power to hire out a misdemeanor convict who is also in custody on an accusation of felony. *Ex parte Godfrey*, 34.

2. It is incumbent upon the defendant in a misdemeanor case to except to erroneous charges given, and to the refusal of the court to give instructions asked, in order to subject such questions to review by this court. *Winn v. State*, 304.

3. The requisite of a final judgment of conviction prescribed in the ninth clause of article 791, Code of Procedure, to wit, that the defendant "is adjudged to be guilty of the offense as found by the jury," has special if not exclusive application to felony cases. It does not apply to a misdemeanor conviction in which the punishment assessed is only a pecuniary fine, because article 805 of the same Code enacts that in such a case the judgment of conviction shall be that the State "recover of the defendant the amount of such fine and all costs of the prosecution," etc. *Hill v. State*, 379.

4. Misdemeanors cannot be prosecuted in the County Court upon a mere complaint without an information. All offenses save such

MISDEMEANORS — continued.

as are excepted in article 418, Code of Criminal Procedure, must be presented by indictment or information. *Garza v. State*, 410.

5. In 1877 the appellant was convicted of misdemeanor and adjudged to pay a fine and costs amounting to about fifty dollars. Failing to pay, he was hired out as provided by law, and the hirer gave bond to the county judge for the payment of two dollars per month for the services of appellant until the fine and costs should be paid thereby. This contract was never annulled, but, after the lapse of more than four years, the fine and costs being unpaid by the hirer and his bond found worthless, a *capias pro fine* was issued and the appellant taken and detained by virtue thereof. Thereupon he sued out *habeas corpus* to the County Court, and on the hearing thereof the hirer was allowed to testify, over objection by the appellant, that he hired appellant for only two months. The County Court remanded the appellant into custody until the fine and costs should be fully paid; and from this judgment he appeals. *Held*, that the trial court erred in admitting parol evidence contrary to the conditions of the bond, and erred in not discharging the appellant from custody. Whatever may be the liability of the hirer, and notwithstanding the worthlessness of his bond, the fine and costs are settled so far as the appellant is concerned, and he is no longer liable for their payment. *Ex parte Price*, 538.

MISNOMER.

1. A middle name or initial is not recognized by law, nor is its omission or misrecital a matter of any legal significance, unless it appears that injury resulted therefrom to a different person than the one intended. *Delphino v. State*, 30.

2. Indictment for theft alleged the stolen animals to be the property of F. A. Fater; but the proof showed that the middle initial of the owner's name was R. *Held*, not a variance, but a discrepancy of no legal significance. *Id.*

MUNICIPAL LAW.

See HABEAS CORPUS.

1. A city or town incorporated under the general law may ordain that offenders against its penal ordinances shall be prosecuted in its municipal name. *Boland, Ex parte*, 159.

2. A city ordinance made it penal to carry prohibited weapons within the corporate limits, but omitted to exempt travelers as does the Penal Code. *Held*, that the ordinance is not void, but must be construed in subordination to the provisions of the Code, which except travelers and certain other classes from the inhibition. *Id.*

3. *Quære*: What presumptions obtain in this State in favor of proceedings before mayors and recorders? *Id.*

MURDER.

See **MALICE.**

MANSLAUGHTER.

SELF-DEFENSE.

1. In a trial for murder there was evidence tending to prove that the deceased had made threats to kill the defendant, and that, when shot by the defendant, he had a pistol upon his person and was advancing on the defendant in a violent and threatening manner. *Held*, error to so charge the jury as to condition the defendant's right of self-defense upon his having resorted to all other preventive means, save retreat, before firing upon the deceased. On the contrary, if it reasonably appeared by the acts of the deceased, or by his words coupled with his acts, that it was his purpose to take the life of the defendant, or to do him serious bodily harm, the defendant, before slaying the deceased, was not bound to resort to all other preventive means save retreat, but had the right to slay him instantly and with the most effective means. This right accrued to the defendant not only at the very time the attack was being made upon him, but at any time after some act was done by the deceased showing an evident intent to take the life of the defendant. *Foster v. State*, 105.

2. Instructions to juries should carefully avoid confounding the essential distinctions which the Penal Code, in articles 570 and 572, establishes between those cases in which the assaulted party may slay his assailant without resorting to other means of prevention, and those in which it is incumbent on him to first resort to all such means save retreat. *Kendall v. State*, 8 Texas Ct. App. 569, cited on this subject with emphatic approval. *Id.*

3. The cases of *Guffee v. State*, 8 Texas Ct. App. 187, and *Foster v. State*, *Id.* 248, cited and approved with respect to the distinctions between the degrees of culpable homicide, and upon the amenability of one who, having interfered in a combat between his friend and the deceased, becomes involved in it and kills the latter. *Kemp v. State*, 174.

4. Note the proof which, on this appeal from a capital conviction, is held insufficient to show that the killing was upon express malice. *Id.*

5. Malice is an essential constituent of murder either of the first or the second degree. The homicidal act must not only be unlawful, but the slayer must be actuated by malice; and whether he was so actuated involves the pivotal issue in murder trials wherein the contest is between murder on the one side and manslaughter or justifiable, excusable, or negligent homicide on the other. Without malice there can be no murder. *Holmes v. State*, 223.

6. It follows that, if the charge to the jury in a trial for murder fails to define or explain the element of malice, it fails to present the "law applicable to the case," as required by the Code. *Id.*

MURDER — continued.

7. See a state of proof in a trial for murder which required the law of manslaughter to be given in charge to the jury. *Id.*

8. In a trial for murder it was legitimate for the State to prove that the deceased, when killed, was under the influence of intoxicating liquor. *Id.*

9. Evidence of general character of the deceased as a peaceable, inoffensive man, and one not reasonably likely to execute previous threats, is available to the prosecution when the defendant seeks to justify homicide on the ground of threats, whether the defendant has or has not put the general character of the deceased in issue. *Russell v. State*, 288.

10. See the opinion *in extenso* for rule laid down defining the relevancy of evidence of previous threats, affrays, etc., and the extent to which such evidence is admissible in a trial for homicide. *Id.*

11. However remote from the main issue in point of time, place or other circumstances, a fact may be, if relevant, and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of its weight to the jury. See the opinion for discussion of the rule. *Id.*

12. It being testified by a witness that, immediately preceding the homicide, the defendant and himself increased their speed to avoid the deceased who was in pursuit, it was proposed to prove by the witness that the defendant proposed to increase their speed in order to escape a difficulty with the deceased. *Held*, that the exclusion of this evidence was error. *Id.*

13. That the deceased had made threats against the life of the defendant will not avail as a defense to a prosecution for murder, in the absence of evidence showing hostile demonstrations by the deceased at the time of the killing. *Thomas v. State*, 315.

14. While it is true that statements of the deceased concerning previous difficulties with the defendant are not admissible as part of his dying declarations, yet it is the duty of the defense to object thereto when offered. Otherwise this court will not interfere. *Id.*

15. See evidence held sufficient to sustain a conviction for murder in the first degree. *Id.*

16. It is not necessary that the danger be actual and real, provided the party acted on a reasonable appearance and belief of danger. See the opinion *in extenso*, for the question and authorities discussed and for a charge on the subject held fatally defective. *Jordan v. State*, 435.

17. When the proof shows an unlawful killing, and no evidence has been adduced which tends to show express malice on the one hand, or any justification, excuse or mitigation on the other, the law implies malice, and the offense is murder of the second degree. *Hill v. State*, 456.

MURDER — continued.

18. Article 612 of the Penal Code provides: "That the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed unless from the manner in which it was used such intention evidently appears." *Id.*

19. Article 613 of the Penal Code provides that "if any injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing will be manslaughter or murder according to the facts of the case." Articles 612 and 613 apply to cases where *intent* to kill evidently appears, or where such intent is evidenced by the cruelty of the manner in which the injury was inflicted. *Id.*

20. Being found guilty of murder the defendant moved in arrest of judgment because the indictment charged one G. as well as himself with the crime, and then stated that it was not intended thereby to charge the said G., inasmuch as he was separately indicted for the same offense. *Held*, that, as the indictment was good so far as appellant was concerned, his motion in arrest was properly overruled. *Lum v. State*, 483.

21. See evidence in a murder case held sufficient to identify the body of the deceased, and note a state of proof held not to necessitate instructions to the jury on the law of manslaughter. *Id.*

22. To warrant a conviction for murder of the first degree, it is incumbent on the State to prove that the killing was done on express malice, and with a sedate, deliberate mind and formed design; but nevertheless a homicide may be murder of the first degree although the result of the sudden execution of an immediate resolve to kill or to inflict serious bodily injury which may result in death, and in such cases the *indicia* of express malice may be evidenced by the cool, calm and circumspect deportment of the slayer at the time of the fatal act, and immediately anterior and subsequent thereto,—by the absence of a provocation or exciting cause,—by the nature of the fatal act itself, and the character of instrument used, as well as the manner of its use,—by declarations indicative of the state of mind or the motives of the slayer,—or by other evidential circumstances pertinent to the issue. *Gaitan v. State*, 544.

23. It is not necessary that the evidence of express malice shall demonstrate it to mathematical certainty. The requisite degree of certainty is such as is reasonably sufficient to satisfy and convince the jury. *Id.*

24. In a trial for murder the defense, with reference to the question of manslaughter, asked the following instruction to the jury: "You may take into consideration the fact that the defendant was intoxicated at the time of the commission of the crime, in deciding the adequacy of the cause of the passion under which he acted, or

MURDER — continued.

if the cause of his passion was adequate in law to reduce the crime from murder in the second degree to manslaughter." *Held*, properly refused by the court below because incorrect as a legal proposition. The ebriety or inebriety of the slayer cannot affect the existence or non-existence of the "adequate cause" without which there can be no manslaughter. *Id.*

25. See evidence held sufficient to sustain a conviction for murder in the first degree.

26. See evidence in a trial for murder which, it is held, justified the trial court in giving in charge to the jury the law of aiders and abettors. *Reed v. State*, 587.

N.**NEWLY-DISCOVERED EVIDENCE.**

See **NEW TRIAL**, 7.

NEW TRIAL.

See **FACT CASES**.

PRACTICE.

REHEARING.

1. On being convicted of misdemeanor the defendant moved for a new trial, and on the overruling of that motion gave notice of appeal and entered into recognizance therefor. On the next day he filed another motion for a new trial, which the county attorney moved the court to dismiss because the defendant's appeal had been perfected. The trial court allowed the defendant to dismiss his appeal, and granted him a new trial; but the county attorney sends a transcript to this court on the ground that the award of a new trial by the court below was a nullity. *Held*, that the action of the court below was not beyond its jurisdiction while its term lasted, nor was there error in the award of a new trial. *Fricke v. State*, 6.

2. A new trial should not be granted in order to enable the defense to obtain testimony to impeach the evidence of the prosecuting witness; and it is immaterial, it seems, that such testimony is newly-discovered. *Atkins v. State*, 8.

3. No application for a continuance asked on account of the absence of a witness is now grantable as a matter of right; but, when a continuance has been refused and the defendant convicted, if it appeared at his trial that the evidence of the absent witness was material and probably true, then a new trial should be granted. *Williams v. State*, 63.

4. At a trial for a misdemeanor the evidence was admitted and the argument to the jury progressing when it was discovered that the information had not been read and that no plea had been made

NEW TRIAL — continued.

by or entered for the defendant. Over objections by the defense, the trial court allowed the prosecuting counsel to read the information to the jury, and caused the plea of not guilty to be entered for the defendant, who refused to plead; and thereupon the argument was resumed and the trial concluded with the conviction of the defendant, who duly reserved exceptions. The trial judge accounts for his rulings on the ground that his attention had not been called to the irregularities complained of, and that the defense made no objection to the evidence when it was introduced. But *held* that the trial was conducted with such disregard of statutory requirements that, whether the defendant suffered prejudice or not, the conviction cannot stand. *Cole v. State*, 67.

5. In a trial for horse-theft the only material evidence inculpatory of the defendant was that of one S., which was contradicted in some particulars by his own testimony at the examining trial, and which, moreover, showed knowledge if not complicity on his part, and a motive to convict the defendant. Defendant had been refused a continuance asked for the purpose of procuring certain *alibi* testimony commensurate with and contradictory of the evidence of S. *Held*, that on this state of case the defendant's motion for a new trial should have been granted. *Garrold v. State*, 219.

6. If the State has concealed witnesses from the defense until placing them upon the stand, the defendant's resource is by motion in writing for permission to withdraw his announcement for trial. He cannot test his strength with the State and, in the event of defeat, urge such concealment in his motion for new trial. Fairness is incumbent on the prosecution. *Lindley v. State*, 283.

7. Motion for new trial on account of newly-discovered evidence should not be granted when it is clear that the new evidence would not change the result; but when it is doubtful how it would affect the verdict, the doubt should be resolved in favor of the accused. See the opinion for the rule and authorities. *Id.*

8. Separation of the jury will authorize a new trial, only when it appears that the jury have been tampered with, or may have been tampered with. *Russell v. State*, 288.

9. As a predicate for the introduction of the written testimony of one L., the county attorney filed an affidavit in which it was averred that this witness was beyond the jurisdiction of the court. After the trial and in the motion for new trial, the defense assailed this affidavit by counter-affidavit. *Held*, that at such stage of the case the proceeding is too late. And *held further*, that it was defective in failing to show that the facts were not accessible, or by proper diligence might not have been accessible, when the affidavit for the State was filed. *Ballinger v. State*, 323.

10. *Scire facias* proceedings on forfeited bail-bonds are not within the statute which prohibits a new trial after verdict for the accused. *Gary v. State*, 527.

O.

OFFICERS.

See BRIBERY.

DISQUALIFICATION OF JUDGE.

JURISDICTION, 2.

Though not technically a peace-officer or a policeman, a sergeant or under-officer in the penitentiary service is, while in charge of a convict camp and engaged in duties incident thereto, a "civil officer engaged in the discharge of official duty," within the meaning of article 319 of the Penal Code, and as such is expressly exempt from amenability for carrying a pistol. *Carmichael v. State*, 27.

P.

PENALTY.

1. Within the limits prescribed by law, the amount of the punishment is a matter for the determination of the jury alone. The court is concerned no further than to see that those limits are not transcended by the assessment made by the jury. *Williams v. State*, 63.

2. Theft of property worth less than twenty dollars is punishable by fine and imprisonment in the county jail, or by such imprisonment without fine; but not by fine alone. *Sager v. State*, 110.

3. Cumulative punishments were not in vogue prior to the adoption of the Revised Codes, and cannot now be assessed for offenses committed prior to the adoption of that Code. Such a construction would make the provision of the Revised Code of Procedure (article 800) an *ex post facto* and unconstitutional enactment. *Baker v. State*, 262.

4. Charge of the court which embodies an erroneous instruction as to the punishment prescribed for the offense on trial, is ground for reversal, even though it gave the defendant the benefit of a lighter punishment than that prescribed by the statute. *Cohen v. State*, 337.

5. Charge of the court directed the jury, in the event of finding from the evidence that the defendant was guilty of murder in the second degree, to assess his punishment at confinement in the penitentiary for any length of time "not less than five,"—the word "years" being omitted. *Held*, that the context supplies the omitted word, "years," and that the omission could not have misled the jury. *Hill v. State*, 456.

6. For selling liquor without license the penalty prescribed is a fine not less than the taxes due nor more than double that amount. When there was no proof that any taxes were due to the county, it was error to so instruct the jury as to allow them to assess a higher fine than double the taxes due the State. *White v. State*, 476.

PERJURY.

1. Objections to an indictment for perjury before a grand jury were: 1, because it did not show by direct affirmative allegation that the District Court was in session at the time of the alleged offense; 2, it did not show the organization of the grand jury; 3, it did not show the appointment of A. as foreman of the grand jury; 4, it did not allege that the said grand jury was in session when the oath was administered by A., nor when the alleged statements were made. *Held*, that the indictment, notwithstanding, is sufficient to charge the offense. *St. Clair v. State*, 297.

2. The records of the court were competent evidence to show that the District Court was in session and the grand jury organized when the perjury was committed. *Id.*

PLEA.

See DISQUALIFICATION OF JUDGE.

PRACTICE, 26.

1. Without a plea made by or entered for the defendant, there is no issue and can be no legal trial. Except in capital cases, the proper time to require the defendant to plead is when the case is called for trial and the parties announce ready, or a continuance has been asked and refused; and if the defendant, when called on to plead, refuses to do so or stands mute, the court should then cause the plea of not guilty to be entered for him. *Cole v. State*, 67; *George v. State*, 95.

2. Plea of guilty is not legal or valid and will not support a conviction unless the accused was admonished of its consequences, and unless the other requirements of the Code were complied with. The record on appeal must affirmatively show conformity with the prerequisites, or the conviction will be set aside as though no plea was made by or entered for the defendant. *Frosh v. State*, 280.

PRACTICE.

See AFFIDAVIT.

AMENDMENT.

APPEAL.

BAIL-BOND.

BILL OF EXCEPTIONS.

CHALLENGE TO THE ARRAY,
ETC.

CHARGE OF THE COURT.

CONTINUANCE.

EVIDENCE.

HABEAS CORPUS.

INDICTMENT.

INFORMATIONS.

JUDGMENT.

JURORS AND JURY.

NEW TRIAL.

PENALTY.

PLEA.

PRACTICE IN COURT OF APPEALS.

SENTENCE.

SEVERANCE.

STATEMENT OF FACTS.

THE "RULE."

TIME.

TRANSCRIPT.

TRANSFER OF CAUSES, ETC.

VERDICT.

WAIVER.

WITNESS.

1. On being convicted of misdemeanor the defendant moved for

PRACTICE—continued.

a new trial, and on the overruling of that motion gave notice of appeal and entered into recognizance therefor. On the next day he filed another motion for a new trial, which the county attorney moved the court to dismiss because the defendant's appeal had been perfected. The trial court allowed the defendant to dismiss his appeal, and granted him a new trial; but the county attorney sends a transcript to this court on the ground that the award of a new trial by the court below was a nullity. *Held*, that the action of the court below was not beyond its jurisdiction while its term lasted, nor was there error in the award of a new trial. *Fricke v. State*, 6.

2. Diligence is not shown by merely alleging a timely procurement of process for the absent witness. A proper disposition of the process must be alleged. *Atkins v. State*, 8.

3. A new trial should not be granted in order to enable the defense to obtain testimony to impeach the evidence of the prosecuting witness; and it is immaterial, it seems, that such testimony is newly discovered. *Id.*

4. After the prosecuting counsel had concluded his opening argument to the jury, the defense offered a material witness who had not been summoned but had promised to attend. No dilatory purpose or other malpractice was imputable to the defense. *Held*, that article 661 of the Code of Procedure made it incumbent on the trial court to admit the evidence, and it was error to exclude it. *Cook v. State*, 19.

5. *Prima facie*, the sum of five hundred dollars is not an unreasonable or excessive amount to require as bail upon a charge of felony. Whether excessive in fact depends largely upon the pecuniary condition of the accused. A sum which would be trivial to a wealthy man might be oppressive of a poor one. *Hutchings, Ex parte*, 28.

6. Enforcement of the rule to sequester witnesses is largely discretionary with the trial court, and its action in that respect will be revised only when abuse of the discretion to the prejudice of the appellant is made to appear. *Hoy v. State*, 32.

7. Misspelling does not invalidate a verdict when no doubt obtains as to the word intended, or as to its meaning. *Id.*

8. Article 816 of the Code of Procedure enables a misdemeanor convict, by making the prescribed affidavit of insolvency, to obtain his discharge from imprisonment by working out the fine and costs adjudged against him; but a misdemeanor convict who is also detained in prison on a charge of felony cannot, by complying with the provisions of article 816, be set at liberty. The county authorities have no power to hire out a misdemeanor convict who is also in custody on an accusation of felony. *Ex parte Godfrey*, 34.

9. The Code of Procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on

PRACTICE — continued.

certain occasions, of which one is when the jury return into court for further instructions. *Held*, that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions. It is incumbent on the trial court and the prosecuting attorney, and not upon counsel for the defense, to see to the personal presence of the defendant in a felony case on all such occasions; and a waiver of that right should affirmatively appear to have been expressly and understandingly made by the defendant in person, and should not be rested on implication. *Shipp v. State*, 46.

10. The extent of a cross-examination is a matter which must in practice be largely left to the discretion of the trial judge. The cross-examiner cannot, as a matter of legal right, require that the witness shall restate his testimony in chief. *Thompson v. State*, 51.

11. It is not incumbent on the trial judge to give in charge to the jury the law applicable to a deduction which the jury could not reasonably draw from the evidence. *Williams v. State*, 63.

12. Within the limits prescribed by law, the amount of the punishment is a matter for the determination of the jury alone. The court is concerned no further than to see that those limits are not transcended by the assessment made by the jury. *Id.*

13. At a trial for a misdemeanor the evidence was admitted and the argument to the jury progressing when it was discovered that the information had not been read and that no plea had been made by or entered for the defendant. Over objections by the defense, the trial court allowed the prosecuting counsel to read the information to the jury, and caused the plea of not guilty to be entered for the defendant, who refused to plead; and thereupon the argument was resumed and the trial concluded with the conviction of the defendant, who duly reserved exceptions. The trial judge accounts for his rulings on the ground that his attention had not been called to the irregularities complained of, and that the defense made no objection to the evidence when it was introduced. But *held* that the trial was conducted with such disregard of statutory requirements that, whether the defendant suffered prejudice or not, the conviction cannot stand. *Cole v. State*, 67.

14. Without a plea made by or entered for the defendant, there is no issue and can be no legal trial. Except in capital cases, the proper time to require the defendant to plead is when the case is called for trial and the parties announce ready, or a continuance has been asked and refused; and if the defendant, when called on to plead, refuses to do so or stands mute, the court should then cause the plea of not guilty to be entered for him. *Id.*; *George v. State*, 95.

15. On a trial for aggravated assault a conviction may yet be had.

PRACTICE — continued.

for simple assault, though the Revised Penal Code omits the former provision expressly authorizing such convictions. *Kennedy v. State*, 78.

16. Objection to the competency of a witness or the admissibility of evidence should be made when the witness or evidence is offered, or as soon as the objection is ascertainable. If primarily made after verdict, such objections are not ordinarily available. *Daffin v. State*, 76.

17. Any question which may tend to affect the credit of a witness is generally allowable in his cross-examination. His relations to the accused, or bias against him, and the extent of the bias, may be developed in the cross-examination. See this case for an example. *Id.*

18. A *nolle prosequi* of a former information does not preclude the use of the affidavit therefor as the basis of a new information. *Goode v. State*. 2 Texas Ct. App. 520, cited on this subject with approval. *Boyd v. State*, 80.

19. The enforcement of the rule to sequester witnesses rests in the discretion of the trial judge, and his action will not be revised unless that discretion was abused to the prejudice of the appellant. The Code of Procedure, art. 665, expressly provides that "in no case where the witnesses are under the rule shall they be allowed to hear the testimony or any part thereof." Witnesses who violate the rule, and the officer in charge of them, should be punished as for contempt of court. *Cross v. State*, 84.

20. The extent to which counsel may read to the jury from books is also a matter left largely to the discretion of the trial judge, and one which will not be revised on appeal unless that discretion was abused to the prejudice of the appellant. *Id.*

21. The Code of Procedure expressly empowers the trial judge to regulate the order of argument in criminal trials, but entitles the State's counsel to the concluding address. In his opening argument the State's counsel should fairly develop his case and give the law he relies on; and the trial court should see that he does so. But the opposing counsel are bound to anticipate the line of argument to which the evidence suggests the State's counsel may resort in his conclusion. *Id.*

22. The ruling in *Hewitt v. State*, 10 Texas Ct. App. 501, with reference to the admissibility of evidence "necessary to a due administration of justice" cited with approval. *George v. State*, 95.

23. When the State has put in evidence a portion of a conversation between the defendant and another, the defense has the right to prove the whole of it on the same subject. In this case the prosecuting witness testified that on a certain occasion he accused the defendant of the theft, and the defense proposed but was not allowed to elicit the reply made by the defendant to the accusation.

PRACTICE — continued.

Held error; the ruling of the trial court cannot, under such circumstances, be sustained on the ground that declarations of the defendant were not evidence in his own favor. *Sager v. State*, 110.

24. Cross-examining a State's witness the defense, for the purpose of showing his *animus* or impeaching him, laid the proper predicate and asked him if he had not told the defendant that he had been his friend but was then his enemy, and intended to have him prosecuted on the charge of theft involved in the pending trial. The State's counsel objected on the ground of irrelevancy, and the trial court sustained the objection. *Held*, error.

25. In the course of the trial the defense excepted to certain rulings of the court upon the evidence, and asked time to prepare proper bills of exceptions. *Held*, error to refuse the request. *Id.*

26. The Code of Procedure, article 487, requires that the clerk of a District Court, in executing its order for the transfer of misdemeanor cases to the County Court, "shall accompany each case with a certified copy of all the proceedings taken therein in the District Court." Non-compliance with this requirement is available to the accused by plea to the jurisdiction of the County Court. *Brumley v. State*, 114.

27. The Code of Procedure, article 661, directs that testimony shall be allowed at any time before the argument is concluded, if it appear "necessary to the due administration of justice." Within the purview of this provision testimony to discredit a material witness of the adverse party, by proving his conflicting statements, may well become "necessary to a due administration of justice," even though it be cumulative; and the fact that it was not offered in its regular order is not a sufficient reason for its exclusion. *Bostick v. State*, 126.

28. Motions for rehearing are required by the Code of Procedure to be filed within fifteen days after the rendition of the judgment, unless the court sooner adjourns, in which case the court is empowered to regulate the matter. If the court does not adjourn within the fifteen days, it has no jurisdiction to entertain a motion for rehearing filed after the lapse of that period. But the authority of the court to correct clerical errors and the like, and to entertain proceedings for the enforcement of its judgments, is not thus restricted. *Bailey v. State*, 140.

29. Pendency of other indictments for the same charge is not jeopardy, nor is it in any way available to the accused until he has been put in jeopardy under one of them. He cannot require that the State elect upon which of the indictments it will proceed. *Id.*

30. Objection that the minutes of the court fail to show that the indictment was presented by a grand jury of the proper county must be made before verdict. *Id.*

31. Certificate of the district clerk which sets out that "the fore-

PRACTICE—continued.

going is a true copy of all the proceedings taken in the above case in the District Court, together with a true statement of the bill of costs accrued therein in the District Court, and that the indictment and all papers relating to the same on file in said court, are herewith transmitted," is a substantial compliance with art. 487, Code Crim. Proc. *Gaston v. State*, 143.

82. The action of the trial court in refusing a continuance will not be revised unless challenged there and presented to this court by an authenticated bill of exceptions. Recital in the judgment that a continuance was refused, and that the defendant excepted, will not supply the place of a specific bill of exceptions. *Id.*

83. Acceptance of service of a subpoena on the morning of the trial by a witness who resided eleven miles distant from the court-house, is not such diligence as, in the event of the non-attendance of the witness, will authorize a continuance. See the opinion with respect to the service of subpoena by acceptance. *Id.*

84. During the argument of defendant's counsel, the State was allowed to recall a witness who had been released from the rule and had heard the comments of counsel on the evidence, and the bill of exceptions states that the "defendant objected." *Held*, too vague and indefinite for review; that the ground of objection should be stated; and further, that the court was authorized to receive evidence at any stage of the proceedings pending the argument, when necessary to a due administration of justice, and its action in this respect will not be revised except where prejudice to the defendant is manifest. *Cohea v. State*, 153.

85. The writ of *habeas corpus* does not operate as a writ of error, a *certiorari*, or an appeal. *Quere*, what presumptions obtain in this State in favor of the proceedings of municipal courts? *Boland, Ex parte*, 159.

86. Though all prosecutions for offenses against the laws of the State must be carried on in the name of "The State of Texas," yet a city or town incorporated under the general law may ordain that offenders against its penal ordinances shall be prosecuted in the name of the municipality. See the opinion *in extenso* on this subject, and note the construction placed on the enactments involved in the question. *Id.*

87. Unless requested by a prisoner confined in the county jail, the opportunity to challenge the grand jury is not a matter of right; but with a view to the prevention of improper prosecutions, the practice of affording such prisoners an opportunity to challenge the grand jury is one to be commended. *Kemp v. State*, 174.

88. The trial judge commenced his charge to the jury by informing them that the homicide was committed in another county, and that "the case is in this court by change of venue." Objection to this is based on the fact that the transcript of the proceedings of

PRACTICE—continued.

the court *a quo* had not been filed in the trial court. *Held*, that the judge was fully warranted in apprising the jury of the *status* of the case, and the omission to file the transcript was a mere irregularity which was amenable to subsequent correction. *Id.*

39. Application for a continuance was filed on September 19th, and recited the presence under subpoena of the witness at the previous term of court and his subsequent temporary departure from the State, and alleged that on the 13th of September defendant "asked" for an attachment for the witness. *Held*, that a total want of diligence is manifest, and the continuance was properly refused. *Lowe v. State*, 253.

40. Even if tenable under any circumstances, the objection that the charge of the court was not filed until the day after it was read to the jury, comes too late when made for the first time in this court. *Id.*

41. The indictment charged the defendant and Win. Lowe jointly, and the caption of the charge so stated the case, but the first paragraph announced to the jury the severance of the two, and the separate trial of the defendant. *Held*, that the charge so stating the case raises no presumption that it was prepared for or given in a case other than that on trial. And if it had been, and was applicable to the case on trial, the fact that it had been used in another case would not be ground for new trial. *Id.*

42. Cumulative punishments were not in vogue prior to the adoption of the Revised Codes, and cannot now be assessed for offenses committed prior to the adoption of that Code. Such a construction would make the provision of the Revised Code of Procedure (article 800) an *ex post facto* and unconstitutional enactment. *Baker v. State*, 262.

43. Plea of guilty is not legal or valid and will not support a conviction unless the accused was admonished of its consequences, and unless the other requirements of the Code were complied with. The record on appeal must affirmatively show conformity with the prerequisites, or the conviction will be set aside as though no plea was made by or entered for the defendant. *Frosh v. State*, 280.

44. See the opinion *in extenso* for the requisites of a final judgment in a felony case, and for those of the sentence to be passed thereon. Note recitals which are held insufficient to constitute a final judgment. *Pennington v. State*, 281.

45. Affidavits will not suffice to authenticate the recitals in a bill of exception which are qualified or disputed by the trial judge in his note of explanation thereto. If the court refuses a full and fair bill of exceptions, the defendant is authorized to resort to bystanders. *Lindley v. State*, 283.

46. If the State has concealed witnesses from the defense until placing them upon the stand, the defendant's resource is by motion

PRACTICE—continued.

in writing for permission to withdraw his announcement for trial. He cannot test his strength with the State, and, in the event of defeat, urge such concealment in his motion for new trial. Fairness is incumbent on the prosecution. *Id.*

47. Motion for new trial on account of newly-discovered evidence should not be granted when it is clear that the new evidence would not change the result; but when it is doubtful how it would affect the verdict, the doubt should be resolved in favor of the accused. See the opinion for the rule and authorities. *Id.*

48. The jury in this case returned their verdict in the absence of the defendant, and separated. The court, discovering the absence of the defendant, and having retained possession of the verdict, called the jury together, and had the verdict read in the presence of the defendant. *Held*, that such irregularity of practice constitutes no ground for reversal. *Russell v. State*, 288.

49. Separation of the jury will authorize a new trial, only when it appears that the jury have been tampered with, or may have been tampered with. *Id.*

50. The defendant in this case interposed no objection to the charge complained of when it was given, nor did he point out or specify in his motion for new trial his ground of objection. That the court erred in its charge is an allegation in a motion for new trial too general to authorize review by this court, unless the error be fundamental or injury apparent. *St. Clair v. State*, 297.

51. It is incumbent upon the defendant in a misdemeanor case to except to erroneous charges given, and to the refusal of the court to give instructions asked in order to subject such questions to review by this court. *Winn v. State*, 304.

52. A requested instruction to the jury was refused by the trial judge because it was not filed before it was presented. *Held*, no reason at all. *Lawrence v. State*, 306.

53. Having no right of appeal in a criminal cause, the State has no right to a bill of exceptions. *Id.*

54. Information against one party for "loud and vociferous talking and assault" upon another may be based upon an affidavit which charged both the accused and the other with loud and vociferous talking and with assault upon each other. *Wood v. State*, 318.

55. As a predicate for the introduction of the written testimony of one L., the county attorney filed an affidavit in which it was averred that this witness was beyond the jurisdiction of the court. After the trial and in the motion for new trial, the defense assailed this affidavit by counter-affidavit. *Held*, that at such stage of the case the proceeding is too late. And *held further*, that it was defective in failing to show that the facts were not accessible, or by proper diligence might not have been accessible, when the affidavit for the State was filed. *Ballinger v. State*, 323.

PRACTICE—continued.

56. An affidavit under article 772, Code Criminal Procedure, which avers that "the witnesses reside out of the State of Texas, and are residents of the Indian Territory," is sufficient as to non-residence, and non-jurisdiction of the court. *Id.*

57. Bills of exceptions must state enough of the evidence or facts proved to render intelligible the ruling excepted to. The signature of the judge to the bill of exceptions certifies only that the objections stated were the ones urged, not that they were true in fact. *Id.*

58. District Court Rule No. 75 prohibits the incorporation into the transcript of the commission, notices and interrogatories of a deposition, and this rule is applicable to written testimony taken before an examining court. *Id.*

59. The Code of Procedure, art. 661, expressly provides that evidence necessary to the due administration of justice may be introduced at any time before the argument of the cause is concluded. This provision applies as well to the predicate for the proposed evidence as to the evidence itself. *Id.*

60. In the cross-examination of the prosecuting witness the defense laid no predicate to contradict his testimony by proof of his prior statements conflicting with it, but, after the State had closed its evidence, proposed to recall the witness for that purpose, and then contradict his testimony in chief by his deposition at the examining trial of the cause. *Held*, error to disallow the recall of the witness,—no ill-faith or sharp practice being imputable to the failure to lay the predicate in the course of the cross-examination. *Grosse v. State*, 364.

61. Counsel for the defense promptly objected to the prosecuting counsel, in his closing address to the jury, telling them in effect that public opinion convicted the defendant of the theft imputed to him. *Held*, that the court below should have sustained the objection, and have restricted the prosecuting counsel to discussion of the evidence. *Id.*

62. If the jury after retirement desire further instruction upon a question of law, they are authorized to appear before the court in a body, and ask through their foreman, either verbally or in writing, such additional instruction; and if the subject-matter of the requested charge be proper, the court has no option but to give it, which it must do in writing. If the subject-matter be improper, the court should so inform the jury in writing. *Conn. v. State*, 390.

63. After being out from 10 o'clock P. M. until 3 o'clock P. M. on the next day without agreement, the jury came into court, and their foreman handed a written paper to the judge. The record does not disclose what was written on the paper. To this the judge replied verbally, "I can answer your communication, but I don't think it proper. I covered the point in my charge." The court

PRACTICE—continued.

then proceeded to say to the jury: "There is another case here that cannot be tried until this is decided. It is ruining. The State pays you two dollars a day, and unless you decide, I will keep you here until Monday morning." To this entire proceeding the defendant excepted. *Held*, that the exception was well taken; that the contents of the paper should have been disclosed by the court, and that the statements of the court to the jury were improper. *Id.*

64. See the opinion in this case for an instance of a breach by counsel of the privilege of discussion, wherein the court should have interfered. *Id.*

65. The right to sever and place his co-defendant on trial, and to use him as a witness, if acquitted, is a right guaranteed to every one accused of crime. *Id.*

66. The witness on the stand manifesting no disposition to evade frank, plain and pertinent answers to questions propounded, the fact that he was related to a co-defendant, who was not on trial, did not authorize the prosecuting attorney to propound leading questions. *Id.*

67. Misdemeanors cannot be prosecuted in the County Court upon a mere complaint without an information. All offenses save such as are excepted in article 418, Code of Criminal Procedure, must be presented by indictment or information. *Garza v. State*, 410.

68. Plaintiff in error was surety for one S. on the latter's bond for appearance in the County Court, to answer the State on a charge of theft. Indictment was subsequently found in the District Court against S. for petty theft, but neither it nor an information was presented in the County Court at its first term after the execution of the bond, nor did the State's attorney show cause and obtain an order of court preventing the lapse of the bond, as provided in article 592, Code of Procedure. Nevertheless, forfeiture of the bond was entered in the County Court and such further proceedings had as resulted in final judgment against the plaintiff in error as surety. *Held*, that the sureties on the appearance bond were discharged from liability by reason of the non-presentment of an indictment or information against their principal at the first term of the County Court after the execution of the bond. Wherefore the judgment of the court below is not only reversed, but the cause is dismissed. *Jones v. State*, 412.

69. By the record alone is a cause determinable on appeal. It is not competent for the county judge and the prosecuting attorney to authenticate matters *dehors* the record. *Brown v. State*, 451.

70. When additional instructions are allowed to be given at the request of the jury, they can only be given when the defendant is present in court. *Granger v. State*, 454.

71. The court, of its own motion, altered its charge in the absence of the defendant and without his knowledge or consent; of

PRACTICE — continued.

which action he complained in his motion for new trial. *Held*, that whether or not the alteration was material, the action of the court was error. *Id*.

72. The Code of Procedure, article 649, provides that a severance may be had by any one of several defendants jointly prosecuted; and, if the severance is sought for the purpose of obtaining a co-defendant's evidence, it is required that the applicant file his affidavit stating that fact and that the evidence of his co-defendant is material to his defense, and further alleging that there is no evidence against the co-defendant. Literal adherence to the language of the Code is not necessary in the affidavit, and it is sufficient if it substantially complies with the requirements prescribed. In the present case the applicant swore that he "verily believed" there was no evidence against the co-defendant, and this is *held* sufficient. *Reed v. State*, 509.

73. But the allegation that there is no evidence against the co-defendant may, it seems, be controverted by the State; and a previous trial and conviction of the co-defendant would be sufficient, *prima facie*, to rebut the allegation, and to authorize the trial court to disregard the affidavit, unless the conviction had been reversed on appeal because of the want of evidence against the party. *Id*.

74. When the offense of which the principal obligor is accused is named in the bail-bond, and it appears therefrom that he is accused of an offense against the laws of this State, it is not necessary that the bond shall disclose the mode of the accusation,— *i. e.*, whether it is by indictment, information, or otherwise. *McGee v. State*, 520.

75. Article 764 of the original Penal Code made theft from a house a felony irrespective of the value of the property taken, and as its penalty prescribed a penitentiary term of which the maximum was less than that prescribed for ordinary theft of property worth twenty dollars or more; but the repeal of that article in 1876 had no other effect than to subject theft from a house to the same punishment as that prescribed for ordinary theft. Since the repeal of said article, therefore, as well as prior thereto, a bail-bond designating theft from a house as the accusation against the principal offender conforms to the requirement that such a bond shall name an offense against the laws of this State. *Id*.

76. *Wilson v. State*, 25 Texas, 169, overruled in so far as it sustains the validity of a bail-bond which misstates the offense charged against the principal obligor. *Id*.

77. The admission of evidence by the trial court will not be revised on appeal unless it was objected to at the trial, either when it was offered or subsequently by motion to exclude it from the jury, nor unless the objections themselves are disclosed and verified by the record. *Gaitan v. State*, 544.

78. The authenticity of a substitute indictment can not be rested

PRACTICE — continued.

on presumption, nor on mere inference from a record-recital that, the original indictment being lost, the court granted leave to substitute it with a copy inspected by the court. The record must affirmatively verify it as a fact that the substitution was actually made. *Rogers v. State*, 608.

79. On the *voir dire* of a juror he stated that he heard the evidence in the previous trial of one O. for the same offense charged against the appellant, and had formed the opinion that O. was guilty, but had formed no opinion as to the guilt or innocence of appellant. The defense challenged the juror for cause, but the trial court overruled the challenge, and, the peremptory challenges of the defense being exhausted, the juror was put on the panel which convicted the appellant. The defense reserved a bill of exceptions, but it does not manifest that the evidence in O.'s case was the same as that in the appellant's, nor disclose how the appellant's amenability was affected by the evidence adduced against O. *Held*, that this state of the record fails to show that the juror entertained a disqualifying opinion in this case, or that the trial court erred in impaneling him. But *held further*, that the better practice is to discharge a juror whose impartiality is questionable. *Dreyer v. State*, 631.

PRACTICE IN COURT OF APPEALS.

See JURORS AND JURY.

PLEA.

PRACTICE.

1. This court presumes the competency of a trial judge to control the argument of counsel, and does not revise his rulings in doing so unless it is made apparent that they were in violation of law or an abuse of his judicial discretion to the prejudice of the appellant. *Atkins v. State*, 8.

2. To authorize this court to reduce an ostensibly reasonable amount of bail fixed by the court below, the pecuniary circumstances and ability of the applicant should be shown in the record. *Ex parte Hutchings*, 28.

3. Refusal of a continuance will not be revised on appeal unless the transcript brings up a bill of exceptions duly reserved. *Delphino v. State*, 30.

4. To enable this court to pass upon errors assigned upon the evidence, it is indispensable that the evidence involved in the inquiry be brought up in the record by a statement of facts or bill of exceptions. If the evidence be not thus brought up, this court can only revise the indictment and consider whether the charge of the court below correctly and sufficiently enunciated to the jury the law applicable to any state of facts germane to the indictment. *White v. State*, 38.

PRACTICE IN COURT OF APPEALS—continued.

5. If appellant's counsel agreed to the statement of facts, its recitals are conclusive upon him in this court. *Cross v. State*, 84.

6. *Habeas corpus* does not operate as a writ of error, a *certiorari*, or an appeal. If the relator is in custody under a *capias pro fine*, the judgment imposing the fine can be revised on *habeas corpus* no further than to determine whether the court *a quo* had jurisdiction to render it. *Boland, Ex parte*, 159.

7. Statement of facts must be authenticated during the term of the court unless during the term an order was entered of record allowing the statement to be prepared and filed within ten days after the adjournment for the term; and on appeal the order must be brought up in the record, or this court cannot recognize for any purpose a statement approved after the adjournment of the trial court. *Durley v. State*, 172.

8. When no authentic statement of facts appears in the record, but a proper bill of exceptions shows that there was no proof of the venue of the offense, or no sufficient identification of the defendant as the culprit, this court must assume the verity of these defects in the proof, and will set aside the conviction. *Id.*

9. If, as in the present case, the appellant was convicted of murder in the court below, and the record on appeal shows that no definition or exposition of the term malice was given in charge to the jury, this court is authorized to set aside the conviction on that account, notwithstanding the appellant failed to ask a proper instruction in the court below, but raised the question in his motion for a new trial. *Holmes v. State*, 223.

10. In a trial for murder, the law of self-defense, though invoked by the evidence, was charged in a merely negative form, and the charge was applicable to a case in which the accused gave the provocation, though there was no evidence tending to support that theory. But the defense neither excepted to the charge at the time nor relied on its errors in his motion for a new trial, and it is not obvious that the accused, who was convicted of manslaughter, was seriously prejudiced by the errors in the charge. *Held*, that the objections to the charge come too late, being mooted in this court for the first time. *Gardner v. State*, 265.

11. Though a convicted defendant has a right of appeal in any criminal action, yet he is not convicted until judgment final is rendered against him. If, therefore, the record on appeal shows no final judgment in the trial court against the appellant, the appeal will be dismissed by this court. *Pennington v. State*, 281.

12. If the final judgment on a forfeited bail bond be erroneous by reason of repugnancy between it and the judgment *nisi*, the error could be corrected on appeal, without remanding the case to the court below. *Robinson v. State*, 309.

13. This court will not review instructions complained of, when

PRACTICE IN COURT OF APPEALS—continued.

the accused has reserved no bill of exceptions thereto, nor asked any charge upon the issues in controversy. *Garza v. State*, 345.

14. By the record alone is a cause determinable on appeal. It is not competent for the county judge and the prosecuting attorney to authenticate matters *dehors* the record. *Brown v. State*, 451.

15. The admission of evidence by the trial court will not be revised on appeal unless it was objected to at the trial, either when it was offered or subsequently by motion to exclude it from the jury, nor unless the objections themselves are disclosed and verified by the record. *Gaitan v. State*, 544.

16. Though in a felony case it is the duty of the trial court to charge the law applicable to every legitimate phase of the case, yet the omission to do so is not necessarily erroneous when it is not palpable and radical, and was not called to the attention of the trial court. *Rhodes v. State*, 563.

PRESUMPTIONS.

See CHARGE OF THE COURT, 15.

THEFT, 22.

WITNESS, 8.

1. To constitute an assault and battery the injury must be intentionally inflicted; but when injury is inflicted by violence the intent to injure is presumed, and it devolves upon the defense to repel the presumption by countervailing proof. The intended injury may be bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind. Manipulation of a woman without her consent, in order to obtain sexual knowledge of her person, may superinduce such emotions without inflicting bodily pain. *Atkins v. State*, 8.

2. This court presumes the competency of a trial judge to control the argument of counsel, and does not revise his rulings in doing so unless it is made apparent that they were in violation of law or an abuse of his judicial discretion to the prejudice of the appellant. *Id.*

3. *Quære*: What presumptions obtain in this State in favor of the proceedings of municipal courts? *Boland, Ex parte*, 159.

PRIVILEGE OF COUNSEL.

1. The extent to which counsel may read to the jury from books is also a matter left largely to the discretion of the trial judge, and one which will not be revised on appeal unless that discretion was abused to the prejudice of the appellant. *Cross v. State*, 84.

2. The Code of Procedure expressly empowers the trial judge to regulate the order of argument in criminal trials, but entitles the State's counsel to the concluding address. In his opening argument the State's counsel should fairly develop his case and give the law he relies on; and the trial court should see that he does so. But the

PRIVILEGE OF COUNSEL—continued.

opposing counsel are bound to anticipate the line of argument to which the evidence suggests the State's counsel may resort in his conclusion. *Id.*

3. Counsel for the defense promptly objected to the prosecuting counsel, in his closing address to the jury, telling them in effect that public opinion convicted the defendant of the theft imputed to him. *Held*, that the court below should have sustained the objection, and have restricted the prosecuting counsel to discussion of the evidence. *Grosse v. State*, 864.

4. See the opinion in this case for an instance of a breach by counsel of the privilege of discussion, wherein the court should have interfered. *Conn v. State*, 890.

R.

RAPE.

1. In a trial for rape the injured female was allowed, over objection by the defense, to narrate the circumstances of an assault made by the accused upon her father-in-law, when the latter came to her rescue during her struggle with the accused. *Held*, that the evidence was *res gestæ* and germane to the accusation for which the accused was on trial. *Thompson v. State*, 51.

2. The same witness was further allowed, over objection, to state the fact that her father-in-law was dead at the time of the trial. *Held*, that this fact was admissible to account for the non-production of an important witness by the prosecution. *Id.*

11. Indictment for rape charged an assault upon the female with intent to ravish and carnally know her, and alleged that the accused obtained carnal knowledge of her without her consent and against her will. *Held*, not a good indictment to charge a rape by force, because it neither alleges that the accused obtained the carnal knowledge by force, nor that he ravished the female. See the opinion in full. *Elschleper v. State*, 801.

RECEIVING STOLEN PROPERTY.

If, at a trial on an indictment for theft, the conviction depends on evidence which proves the receipt and concealment of stolen property, knowing it to have been stolen, correct practice requires that the verdict should show that the conviction was for the receiving and concealment. *Dreyer v. State*, 631.

RECOGNIZANCE.

See BAIL-BOND.

REFUSAL TO RENDER TAX-LIST.

By the literal import of article 113 of the Penal Code it is *ipso facto* a misdemeanor to refuse or neglect to make out and render

REFUSAL TO RENDER TAX-LIST—continued.

the list of taxable property when called on in person by the assessor or his deputy; but article 4716 of the Revised Civil Statutes authorizes a delinquent to exculpate himself before the board of equalization, and, if he fails to do so, requires the board to return his name to the assessor on the list of delinquents presentable to the grand jury. *Held*, that the penal enactments on this subject must be construed in connection with correlative provisions of the Civil Statutes; and therefore, notwithstanding the literal import of said article 113, no criminal prosecution of such a delinquent can be maintained before he is allowed opportunity to exonerate himself before the board of equalization. See the opinion *in extenso* on this topic, and note the civil enactments collated therein. *Mock v. State*, 56.

REHEARING.

Motions for rehearing are required by the Code of Procedure to be filed within fifteen days after the rendition of the judgment, unless the court sooner adjourns, in which case the court is empowered to regulate the matter. If the court does not adjourn within the fifteen days, it has no jurisdiction to entertain a motion for rehearing filed after the lapse of that period. But the authority of the court to correct clerical errors and the like, and to entertain proceedings for the enforcement of its judgments, is not thus restricted. *Bailey v. State*, 140.

RETAILING.

See **SELLING LIQUOR.**

To an indictment for unlawfully selling liquor exception was taken because the word *drink* was written "dring," and the word *spirituous* was written "spiritous." *Held*, with respect to the former mistake that it is cured by the context and the word itself is surplusage; and that, with respect to the latter, the error in the spelling does not vitiate and the principle of *idem sonans* applies. *Brumley v. State*, 114.

ROBBERY.

See **EXTRA-TERRITORIAL OFFENSES.**

1. Bail-bond described the offense as an "assault with intent to rob." It is urged that this expression designates no offense under the law of this State, because not tantamount to "assault with intent to commit the offense of robbery." But *held* that the designation used in the bond is correct. *Robinson v. State*, 309.

2. Article 3 of the Revised Penal Code amends the corresponding article of the original Code, and permits an act or omission to be "made a penal offense" without being "expressly defined." *Id.*

3. Robbery and assault with intent to rob are offenses specifically known to and defined by the Penal Code. *Id.*

S.

SCIRE FACIAS.

See BAIL-BOND.

1. The Code of Procedure, article 462, provides that if a party arrested under a *capias* for felony had previously given bail to answer said charge, his sureties shall be released by the arrest, and he shall be required to give new bail. *Held* that, in a *scire facias* proceeding upon the original bail-bond, it was competent for the State to controvert and disprove the sheriff's return on the *capias* to the effect that he had executed it by arresting the party. But it seems that a sheriff's return on a *capias* that he had "executed" it, without showing how, does not purport an actual arrest of the party. *Gary v. State*, 527.

2. *Scire facias* proceedings on forfeited bail-bonds are not within the provision of the Code of Procedure which prohibits a new trial after verdict for the defendant. *Id.*

3. The condition of a bail-bond stipulated that the principal obligor should make his appearance before the proper court at its next ensuing term, and should there remain from day to day and from term to term until discharged, but omitted to stipulate that he should answer the accusation against him. *Held*, that the omission does not impair the validity of the bond. *Id.*

4. A surety signed a blank bail-bond and delivered it to his principal to be filled up with the penal sum of \$300. The principal, being required to give bail in \$1,000, presented the blank bond with the surety's signature, and the examining magistrate filled it with the sum of \$1,000, conditioned for the appearance of the principal. The principal failed to appear and the bond was forfeited, and the surety, in defense to the *scire facias*, alleged the facts and pleaded *non est factum* to the bond. *Held*, that the act of the surety in signing and delivering the blank bond, knowing its purpose, made him liable for the amount inserted in it by the examining magistrate, who accepted it in ignorance of any limit to the surety's authorization. *Id.*

SELF-DEFENSE.

See MANSLAUGHTER.

MURDER.

1. The cases of *Guffee v. State*, 8 Texas Ct. App. 187, and *Foster v. State*, *Id.* 248, cited and approved with respect to the distinctions between the degrees of culpable homicide, and upon the amenability of one who, having interfered in a combat between his friend and the deceased, becomes involved in it and kills the latter. *Kemp v. State*, 174.

2. To a prosecution for homicide the defendant interposed the plea of self-defense based upon threats made by the deceased to the defendant in person, prior to the homicide, and also upon previous

SELF-DEFENSE—continued.

difficulties between the parties. *Held*, that under such plea, the defendant, in order to show whether or not the grounds for fearing death or serious bodily harm were reasonable, was entitled to lay before the jury all circumstances which would go to show the character of the threats, the intention with which they were made, and the grounds of fear on which the defendant acted, and hence evidence of previous affrays, difficulties, attacks and threats are admissible. *Russell v. State*, 288.

3. See the opinion *in extenso* for rule laid down defining the relevancy of evidence of previous threats, affrays, etc., and the extent to which such evidence is admissible in a trial for homicide. *Id.*

4. Charge of the court which, upon the question of self-defense, abridges the right of a defendant to act upon reasonable appearance of immediate danger to life or of serious bodily harm; or that instructs the jury in effect that they must find affirmatively that the danger was actual and real, or that the defendant must show affirmatively that he could not reasonably know that the danger threatened was not in fact real, is error. *Jordan v. State*, 485.

5. It is not necessary that the danger be actual and real, provided the party acted on a reasonable appearance and belief of danger. See the opinion *in extenso*, for the question and authorities discussed, and for the charge on the subject *held* fatally defective. *Id.*

6. In a trial for murder the court charged the jury that an adulterer, caught in the act of adultery, has no right to resist the attack made upon him by the husband. *Held*, that the instruction is erroneous because it deprives the slayer absolutely and entirely of all right of self-defense, regardless of the legal principles which, while according that right plenary to him only who acts from necessity and is himself without fault, do not wholly deny it to him who, when caught in the perpetration of a misdemeanor and assaulted by the person aggrieved thereby, kills the latter to save his own life. Adultery is only a misdemeanor in this State, and therefore the instruction given to the jury transcends the law. See the opinion *in extenso* on the distinction between the perfect and imperfect right of self-defense. *Reed v. State*, 509.

7. The amenability of a person charged with crime is conditioned solely on his own acts, and is never dependent upon the immunity of the injured person in case the result had been different. Therefore, though the Penal Code justifies the husband in slaying a person when taken in the act of adultery with the wife, it does not follow that the adulterer is guilty of murder if, being attacked by the husband, he kills him to save his own life. Under such circumstances manslaughter would be the maximum of culpability. *Id.*

SELLING LIQUOR.

1. The principal change effected in indictments by the act of March 26, 1881, "to prescribe the requisites of indictments in cer-

SELLING LIQUOR—continued.

tain cases," is to obviate the requirement of circumstantial allegations. It does not affect the evidence necessary to establish the inculpatory facts. *White v. State*, 476.

2. Indictment charged that the defendants did, "acting together and with each other, unlawfully sell intoxicating liquors to A. J. Dawson, without having obtained license therefor." *Held*, a good indictment under the act of 1881, "to prescribe the requisites of indictments in certain cases." A sale of any quantity might be proved by the State, to establish the offense. *Id.*

3. At the trial of merchants on an indictment which charged the sale of liquor to one D., the proof showed that the sale to D. was made by a clerk of the defendants in their absence, but failed to show their complicity in the sale. *Held*, that it was error to allow the State, over objections by the defense, to prove that the clerk also sold liquor to others beside D., in the absence of the defendants. *Id.*

4. For selling liquor without license the penalty prescribed is a fine not less than the taxes due nor more than double that amount. When there was no proof that any taxes were due to the county, it was error to so instruct the jury as to allow them to assess a higher fine than double the taxes due the State. *Id.*

5. Indictments presented prior to the time when the Common-Sense Indictment Act of 1881 took effect cannot be tested by that enactment. *Eppstein v. State*, 480.

6. The charging part of an indictment, filed June 23, 1881, alleged that the accused pursued the "occupation of a wholesale liquor dealer, and did then and there sell spirituous, vinous and other intoxicating liquors in quantities of five gallons and more than that amount, without first obtaining license therefor by payment of the State tax fixed by law upon said occupation; against," etc. *Held*, that the indictment was fatally defective under the law in force when it was presented. And even under the Common-Sense Indictment Act it would be insufficient because it fails to allege the name of the person to whom the sale was made. *Id.*

SENTENCE.

See the opinion *in extenso* for the requisites of a final judgment in a felony case, and for those of the sentence to be passed thereon. Note recitals which are held insufficient to constitute a final judgment. *Pennington v. State*, 281.

SEVERANCE.

1. The right to sever and place his co-defendant on trial, and to use him as a witness, if acquitted, is a right guaranteed to every one accused of crime. *Conn v. State*, 390.

2. The Code of Procedure, article 649, provides that a severance may be had by any one of several defendants jointly prosecuted; and, if the severance is sought for the purpose of obtaining a co-

SEVERANCE — continued.

defendant's evidence, it is required that the applicant file his affidavit stating that fact and that the evidence of his co-defendant is material to his defense, and further alleging that there is no evidence against the co-defendant. Literal adherence to the language of the Code is not necessary in the affidavit, and it is sufficient if it substantially complies with the requirements prescribed. In the present case the applicant swore that he "verily believed" there was no evidence against the co-defendant, and this is *held* sufficient. *Reed v. State*, 509.

8. But the allegation that there is no evidence against the co-defendant may, it seems, be controverted by the State; and a previous trial and conviction of the co-defendant would be sufficient, *prima facie*, to rebut the allegation, and to authorize the trial court to disregard the affidavit, unless the conviction had been reversed on appeal because of the want of evidence against the party. *Id.*

SPECIAL JUDGE.

See DISQUALIFICATION OF JUDGE.

Appellant and one S. were jointly indicted for murder, but the latter was never arrested. The judge of the forum, though in no degree connected with the appellant, was related to S. by a disqualifying consanguinity, and therefore entered an order purporting to recuse himself from trying the appellant, and the governor appointed a special judge to try the cause. Appellant filed a special plea alleging that the regular judge of the forum was not disqualified to try him, and that the special judge was not legally authorized to do so; to which plea a demurrer was sustained. *Held*, error. The plea was a good one to the jurisdiction of the court. Otherwise, however, if appellant and S. had been jointly on trial. *Reed v. State*, 587.

STATEMENT OF FACTS.

1. If appellant's counsel agreed to the statement of facts, its recitals are conclusive upon him in this court. *Cross v. State*, 84.

2. Statement of facts must be authenticated during the term of the court unless during the term an order was entered of record allowing the statement to be prepared and filed within ten days after the adjournment for the term; and on appeal the order must be brought up in the record, or this court cannot recognize for any purpose a statement approved after the adjournment of the trial court. *Durley v. State*, 172.

SUBSTITUTION.

See INDICTMENT, 21.

SURPLUSAGE.

See RETAILING, 1.

SWINDLING.

1. The Code of Procedure, article 794, provides that "when money, property, or other articles of value enumerated in the definition of swindling are obtained in such manner as to come within the meaning of theft or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines such other offense." *Held*, that the effect of this provision is to invalidate an indictment for swindling if the allegations thereof charge facts which constitute a different offense. *Hirshfeld v. State*, 207.

2. Appellant was prosecuted and convicted for swindling. The gravamen of the accusation was the procurement of money by means of a forged indorsement on his own check, and the indictment, though obviously framed on the definition of swindling, charged all the constituents of knowingly uttering a forged instrument; wherefore the defense excepted to it because, under the operation of article 794 of the Code of Procedure, the offense charged was not swindling but the uttering of a forged instrument. *Held*, that the exception was well taken and should have been sustained. *Id.*

3. An essential element of the offense of swindling is that the party injured, in parting with his property, actually relied upon and was deceived by the fraudulent representations or devices of the party accused. *Buckalew v. State*, 352.

4. False pretense, in order to authorize an indictment for swindling, need not be such an artificial device as will impose upon a man of ordinary prudence and caution, nor need it be such as cannot be guarded against by ordinary caution. But if the pretense was absurd or irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, he could not have believed it or been deceived by it, and the pretense is not within the purview of the definition of swindling. *Id.*

5. The enactment of March 26, 1881, commonly called the "Common-Sense Indictment Act," dispenses, in indictments for swindling, with the previously required averments of the falsity of the pretenses and the guilty knowledge of the accused. Therefore, those averments are not necessary in an indictment for swindling presented since that act took effect. *Arnold v. State*, 472.

6. The "Common-Sense" Indictment Act is not retroactive, and does not cure defects in indictments which were presented prior to the time when said enactment took effect. *Id.*

7. See an indictment for swindling which is held insufficient under the law as it was prior to the enactment of March 26, 1881, entitled "An act to prescribe the requisites of indictments in certain cases," but commonly known as the "Common-Sense Indictment Act." It seems that even under the said act of 1881, an indictment

SWINDLING — continued.

for swindling is bad unless it alleges that the defendant obtained the property *by means* of the false representations; and that an averment that the person swindled believed the false representations and by reason thereof parted with his property to the defendant is not tantamount to the allegation that the defendant obtained the property by means of the representations. *Ervin v. State*, 536.

T.

TAXATION.

See SELLING LIQUOR.

By the literal import of article 113 of the Penal Code it is *ipso facto* a misdemeanor to refuse or neglect to make out and render the list of taxable property when called on in person by the assessor or his deputy; but article 4716 of the Revised Civil Statutes authorizes a delinquent to exculpate himself before the board of equalization, and, if he fails to do so, requires the board to return his name to the assessor on the list of delinquents presentable to the grand jury. *Held*, that the penal enactments on this subject must be construed in connection with correlative provisions of the Civil Statutes; and therefore, notwithstanding the literal import of said article 113, no criminal prosecution of such a delinquent can be maintained before he is allowed opportunity to exonerate himself before the board of equalization. See the opinion *in extenso* on this topic, and note the civil enactments collated therein. *Mock v. State*, 56.

THEFT.

See EXTRA-TERRITORIAL OFFENSES.

SWINDLING.

1. In a trial for theft the principal witness against the defendant was one B., who had been previously tried on and acquitted of the same accusation. Over the defendant's objection, the State was allowed to introduce the record of B.'s acquittal. *Held*, error. *Harper v. State*, 1.

2. Appellant was tried for the theft of a receipt for money executed by himself, but which, as set out in the indictment, did not state from whom the money was received. The state offered in evidence a corresponding receipt, except that it contained a clause stating that the money was received from the alleged owner. The defense objected on the ground of variance, which the State proposed to obviate by proof that the variance was caused by an alteration of the receipt since it was taken by the defendant. The trial court overruled the objection and admitted the receipt, on the ground that the question of alteration was one for the jury. The evidence respecting the alteration was conflicting. *Held* that, though a question of

THEFT — continued.

variance arising on a written instrument is ordinarily one of law and for the decision of the court, it was not error, under the circumstances, to admit in evidence the receipt produced by the State, in connection with the proof of its alteration. But *held further*, that the charge to the jury should have submitted to them the issue of fact thus raised, and it was error to refuse a requested instruction properly presenting it. *Huddleston v. State*, 22.

3. In the trial of several defendants jointly indicted for theft, declarations of any one of them, made when the property was first found in their possession and explanatory of their possession of it, are verbal acts and *res gestæ*, and are admissible in evidence on the trial of the defendants or any one of them. *Shelton v. State*, 86.

4. Appellant and one H., being jointly indicted for theft of an estray cow, the latter was tried first and was acquitted. At appellant's trial he proposed to prove by a third party that, when he and H. were first found in possession of the animal, H. claimed it as his property. This court was excluded by the court below on the ground that H. had become a competent witness and his testimony the best evidence of the fact in question. *Held* error. The declaration of H. was *res gestæ*, and it was competent for appellant to prove it by any witness who heard it made. *Id.*

5. In a trial for theft, the alleged owner of the stolen property having testified that the defendant executed to him a bill of sale of it, the State's counsel asked him to state its contents. The defense objected, on the ground that the document itself was the best evidence of its contents. *Held*, error to overrule the objection and allow the witness to state the contents of the bill of sale. *Sager v. State*, 110.

6. Theft of property worth less than twenty dollars is punishable by fine and imprisonment in the county jail, or by such imprisonment without fine; but not by fine alone. *Id.*

7. If one person has the ownership of the property and another has the possession, charge, or control of it, the ownership may be alleged in either. *Hill v. State*, 132.

8. In a trial for the theft of a horse the only evidence inculpatory of the accused was a confession imputed to him by the prosecuting witness, who, being the half-brother of the accused, justified his unnatural attitude by a desire to separate the accused from evil associates. The testimony of this witness was contradictory in various particulars of his own deposition at the examining trial, and material statements which he ascribed to the accused were inconsistent with the evidence of other witnesses. Aside from the putative confession, the only proof of the *corpus delicti* was the fact that the animal was missed from a certain field; and, on the other hand, there was proof that it was repeatedly seen on its ac-

THEFT — continued.

customed range soon after its disappearance from the field. *Held*, that evidence proved neither the *corpus delicti* nor the culpability of the accused. Note the comments made upon it in the opinion. *Id.*

9. The State having proved the possession by the defendant of property recently stolen, he was clearly entitled to put in evidence his explanations of his possession made at the time. See the opinion for evidence in a theft case *held* of first importance to the defense, and which should have been admitted. *Knox v. State*, 148.

10. The indictment charging theft of property over the value of twenty dollars, a verdict that finds the defendant "guilty of the offense as charged in the indictment" is a sufficient finding that he is guilty of theft of property of the value of twenty dollars or over. *Cohea v. State*, 153.

11. In a trial for horse-theft the only material evidence inculpatory of the defendant was that of one S., which was contradicted in some particulars by his own testimony at the examining trial, and which, moreover, showed knowledge if not complicity on his part, and a motive to convict the defendant. Defendant had been refused a continuance asked for the purpose of procuring certain *alibi* testimony commensurate with and contradictory of the evidence of S. *Held*, that on this state of case the defendant's motion for a new trial should have been granted. *Garrold v. State*, 219.

12. The prosecuting witness testified that the defendant told him that he "did not know, but believed that P. and C. took the animal off," and that, acting upon such information, he followed to V. county, arrested P. and recovered the stolen animal. The defendant offered to prove by the witness that he, defendant, had loaned him the animal ridden in pursuit. *Held*, that the court erred in sustaining the State's objection to the evidence proposed. *Hinds v. State*, 238.

13. The State having introduced a confessed thief and an accomplice in the offense for which the defendant was on trial, the defense proposed to prove by him that he was indicted for the same offense, and by agreement with the county attorney to dismiss the prosecution as to him, had turned State's evidence. *Held*, that such proof was competent, and its exclusion was error. *Id.*

14. E., a State's witness, testified that shortly after another certain animal was stolen, the defendant told him that he knew where some stray horses were running, and proposed to get them up and deliver them to the witness to sell, the two to divide the proceeds. The defendant proposed to prove by one W. that he, W., inquired of defendant if he knew anything of the missing animal, and that the defendant replied that he believed E. knew something of it, and that he would make a proposal to E. and get his confidence, and find out if he had such knowledge; and further, that he subse-

THEFT—continued.

quently told W. he had made the proposal to E. but was satisfied that E. knew nothing of the horse. *Held*, first, that the defendant's objection to the evidence of E. should have been sustained; and, second, that the State being permitted to make such proof, the defendant was entitled to the evidence of W. as proposed. *Id.*

15. Evidence of a conspiracy between the defendant and others to engage generally in an enterprise of indiscriminate horse-theft, and which has a strong tendency to connect the defendant with the theft of the specific horse charged in the indictment, is admissible. The conspiracy being shown to have for its purpose the commission of offenses of a certain character, but no specific offense, the acts, declarations and conduct of each of the conspirators, if a specific offense is committed in furtherance of a general design of the conspiracy, are evidence against each, whether or not the conspirator on trial participated in, agreed to or advised the commission of the specific offense on trial. See the opinion for the rule discussed. *Id.*

16. See the opinion for evidence held insufficient to corroborate the testimony of an accomplice. *Id.*

17. Though one who takes up and holds an estray in conformity with the estray laws acquires such a special property in the animal as that an indictment for theft of it may allege the ownership in him, a mere partial compliance with the estray laws, such as preliminary advertisement, manifesting an intention to estray, does not confer either right of possession or special property, and an indictment that alleges the ownership in an unknown person is sufficient. *Lowe v. State*, 253.

18. See evidence held insufficient to sustain a conviction for theft of cattle. *Id.*

19. Indictment laid the possession of the animal alleged to have been stolen in M. M. A. as administrator of J. T. A., deceased. In his evidence, the administrator claimed his right of possession under the inventory of the property of the estate of the deceased, filed April 15, 1878. The defendant to meet this evidence proposed to introduce the inventory and appraisement, which, upon objection by the State, was excluded. *Held*, error. *Baker v. State*, 262.

20. See the opinion for evidence held insufficient to support a verdict of theft of a mare. *Id.*

21. It was error to charge that the unexplained possession of recently stolen property is a fact from which alone guilt of the theft may be inferred, irrespective of the attending and surrounding circumstances, and particularly of the further inquiry whether there was occasion and opportunity for explanation by the accused. *Williams v. State*, 275.

22. In a trial for horse-theft the trial court charged the jury that if the horses, prior to the theft, were last seen in the county where the venue was laid, the law presumed that they were stolen in that

THEFT—continued.

county. *Held*, erroneous because there is no such legal presumption, and because the charge was on the weight of the evidence and invaded the province of the jury. *Id.*

23. In a trial for theft the evidence showed that the defendant took the property openly and in the belief that he had a right to do so. *Held*, error to refuse an instruction for acquittal in case the jury so found the fact; and error to refuse a new trial. *Lawrence v. State*, 306.

24. That the accused knew that the property taken was not his own, and that it was taken to deprive the true owner of it, is an essential element of the crime of theft; and one usually evidenced by a taking in such manner and under such circumstances as to avoid detection or responsibility. See evidence held insufficient to disclose a criminal intent. *Ainsworth v. State*, 339.

25. Charge of the court instructed the jury that "the open and public manner in which property is taken and claimed will not, in any manner, lessen or excuse the offense, if the same was taken with guilty knowledge and fraudulent intent." *Held*, correct as an abstract proposition, but, in view of the evidence, negative in nature and effect, and calculated to mislead the jury. *Id.*

26. Whatever may be the defense interposed, it is the duty of the court to apply clearly, pertinently and affirmatively the law applicable to the facts tending to support it. *Id.*

27. In the absence of a fraudulent intent in the taking of the property of another, such taking constitutes a mere trespass upon property, and when the jury may infer from the evidence that the taking was not fraudulent, the accused is entitled to an instruction to the jury as to the distinction between trespass and theft. *Id.*

28. In a trial for horse-theft the State was permitted, over objection by the defense, to prove that the defendant, while in legal custody and not warned that his statements might be used against him, said, in substance, that one S. got the animal at a certain locality and in the night, and brought it to him, the defendant, and that he took a bell from around its neck and rode it off. The State proved that the animal was taken in the night and from a locality corresponding with that described by the defendant, and that, when last seen before it was stolen, it had a bell around its neck; but, aside from the defendant's statement, there was no proof that he took the bell off the animal and rode it away. *Held* that, assuming that these latter circumstances would, if shown to be true, conduce to establish the guilt of the defendant, the disclosure of them by the defendant, while he was in custody and uncautioned, was not evidence against him; and their admission over his objection was error. *Kennon v. State*, 356.

29. Evidence that a third party, at a given time and place, but not in the hearing of the defendant, told the witness that one of the

THEFT—continued.

men in charge of a drove of cattle "was a Tyler" (defendant's patronymic), was hearsay and not admissible. If the third party had spoken to defendant by name or called him by name, and had been heard by the defendant, a different rule might apply. *Tyler v. State*, 388.

30. See evidence *held* insufficient to sustain a conviction for theft. *Conn v. State*, 390.

31. It was in proof that the defendant, when found in possession of the stolen property, claimed possession by virtue of the consent of the owners' agent. *Held*, that it being shown that the agent was accessible at the time of the trial, and want of his consent not being in proof, he should have been produced by the State to negative, if he could, the statement of the accused. *Powell v. State*, 401.

32. Where a proprietor has sold certain goods to be delivered hereafter, and in order to separate them from bulk pending delivery, places them in a trunk, and his agent, without knowledge of its contents, subsequently sells and delivers the trunk to a third party, who, equally ignorant of the contents, receives the trunk, takes it home and finds the goods, the *status* of the goods is that of lost property, and the relation of the purchaser of the trunk to the contents is that of finder of lost or mislaid property. *Robinson v. State*, 403.

33. Lost property, like any other, may be the subject of theft. *Id.*

34. M., a merchant, sold two coats and a vest to be delivered hereafter, and for keeping placed the articles in a trunk in his store. A day or two subsequently his clerk sold the trunk to the defendant, neither of them examining it, and both ignorant of its contents. The defendant took the trunk home and there discovered its contents, which he did not return, but retained. On the trial, it was insisted for the defense, that, in order to convict for the theft of the coats and vest, the intent to appropriate them must have existed at the time the trunk was delivered and received. But *held*, that if the criminal intent was formed at the time of the discovery of the goods, their appropriation was theft. *Id.*

35. See the opinion for a charge of the court applicable to the principle, and for charges properly refused as repugnant thereto. *Id.*

36. Indictment for theft of cattle need not have charged them to be "work steers," but, so charging, affirmative proof that they were "work steers" was essential to a conviction. Proof to the contrary operates as a fatal variance. *Gray v. State*, 411.

37. The Revised Code of Procedure (article 714) not only re-enacts the provision of the original Code which made the offense of theft to include all unlawful acquisitions of personal property punishable by the Penal Code, but so enlarges the offense of theft as to include within it the offense of swindling and embezzlement. Therefore,

THEFT—continued.

under an ordinary indictment for theft a conviction may be had for embezzlement, provided the offense was committed since the Revised Codes took effect. *Whitworth v. State*, 414.

38. Said article 714 of the Revised Code of Procedure is not violative of the constitutional guaranty that a party "shall have the right to demand the nature and cause of the accusation against him." *Id.*

39. Indictment for theft of cattle alleged the ownership to be in one B. The proof showed that the cattle belonged to the estate of the deceased father of B., but that B. had the charge and control of them. *Held*, under article 426 of the Code of Procedure, that the ownership was well alleged in B., and that the proof was germane to the allegation. *Dreyer v. State*, 503.

40. When the chief inculpatory fact in a trial for theft was possession of the stolen property recently after the theft, it was error to refuse a requested instruction to the effect that such possession was not of itself sufficient to warrant a conviction. *Id.*

41. It being already in proof in a trial for theft of money that the defendant and her little daughter were arrested for the offense, and that disclosures made by the latter induced the officer to take the defendant to her house, with expectation of recovering the money there, the State was further allowed, over objection by the defense, to prove that the defendant, after reaching her home, and while still in arrest and uncautioned, voluntarily raised a plank and seemed to be searching under it for the money. *Held*, that there was no error in allowing this act of the defendant to be put in evidence. It was not a confession. *Rhodes v. State*, 563.

42. In a trial for theft the daughter of the accused was a witness for the State, and it was in proof that she had falsely denied any knowledge of the stolen money. *Held*, that this fact alone did not suffice to render her an accomplice witness. *Id.*

43. When the possession of recently stolen property is relied on as inculpatory of the accused, his explanation thereof is admissible in his behalf though given after he had parted with the possession, provided it was given on the first occasion for any explanation by him. It is not material that the first occasion did not present itself until three or four weeks after he had parted with the possession. *Anderson v. State*, 576.

44. It was in proof that the defendant was in possession of the stolen cattle soon after they were missed by the owner, and the defense adduced evidence of a purchase of them by the defendant. Counsel for the defense asked an instruction to the effect that the defendant's possession was not an inculpatory fact if he purchased the cattle in good faith and believing his vendor had the right to sell them. *Held* that, whether the requested instruction was correctly framed or not, it sufficed to devolve upon the court the duty

THEFT — continued.

of giving to the jury the law which controlled the issue raised by the evidence. *Id.*

45. In a trial for theft the court charged the jury as follows: "The possession of recently stolen property is not conclusive evidence of the guilt of the person having such possession; but such possession, if proved, may be taken into consideration as a circumstance, in connection with all the other facts and circumstances which may have been proven in the case, to enable you to determine as to the guilt or innocence of the accused." *Held*, a charge upon the weight of the evidence, and in direct violation of the provision of the Code of Procedure which inhibits such charges. *McWhorter v. State*, 584.

46. The jury were instructed for acquittal in case the defendant in good faith purchased the stolen animals, but were further instructed that a fraudulent sale was no defense. *Held*, that the jury may have been misled by this latter instruction. See the opinion *in extenso* on the point, and also in elucidation of the opinion in *Shoefecater v. State*, 5 Texas Ct. App. 207. *Dreyer v. State*, 631.

47. It is error in a trial for theft to so charge the jury as to permit the conviction of the accused without proof of guilty knowledge or intent. *Id.*

48. If, at a trial on an indictment for theft, a conviction be had on evidence which proves the receipt of stolen property, knowing it to have been stolen, the verdict should show that the conviction was for the receiving. *Id.*

THEFT FROM A HOUSE.

See BAIL-BOND, 7.

THE "RULE."

1. The enforcement of the rule to sequester witnesses rests in the discretion of the trial judge, and his action will not be revised unless that discretion was abused to the prejudice of the appellant. The Code of Procedure, art. 665, expressly provides that "in no case where the witnesses are under the rule shall they be allowed to hear the testimony or any part thereof." Witnesses who violate the rule, and the officer in charge of them, should be punished as for contempt of court. *Cross v. State*, 84.

2. During the argument of defendant's counsel, the State was allowed to recall a witness who had been released from the rule and had heard the comments of counsel on the evidence, and the bill of exceptions states that the "defendant objected." *Held*, too vague and indefinite for review; that the ground of objection should be stated; and further, that the court was authorized to receive evidence at any stage of the proceedings pending the argument, when necessary to a due administration of justice, and its action in this respect will not be revised except where prejudice to the defendant is manifest. *Cokea v. State*, 153.

THREATS.

See MURDER, 9, 10, 18.

TIME.

Information charged the commission of the offense on April 30, 1881. The trial was on August 3, 1881. The evidence stated the day of the offense as "April 30." Held, sufficient as to time, though the year was not expressly in proof. *Wood v. State*, 318.

TRANSCRIPT.

District Court Rule No. 75 prohibits the incorporation into the transcript of the commission, notices and interrogatories of a deposition, and this rule is applicable to written testimony taken before an examining court. *Ballinger v. State*, 323.

TRANSFER OF CAUSES FROM DISTRICT TO COUNTY COURT.

1. The District Court has no authority to transfer a felony case to the County Court; and therefore an order purporting to make such a transfer is a nullity, and does not divest the jurisdiction of the District Court. No order of the County Court to retransfer the case is requisite. *Fossett v. State*, 40.

2. When, because of the disqualification of a county judge to try a misdemeanor case, it is transferred to the District Court, the jurisdiction of the District Court attaches as amply as if it was original and exclusive; and if the district judge also is disqualified in the case, a special district judge must be chosen or appointed as provided by law, and his election or appointment be made matter of record, and, in the event of an appeal, be brought up in the transcript. The special district judge is empowered to try or dispose of the cause in the District Court, but has no authority to transfer it back to the County Court for trial, even though a new county judge, not disqualified in the case, has acceded to the bench of that court; and therefore such a retransfer to the County Court cannot invest it with jurisdiction over the cause. See the opinion *in extenso*. *Snow v. State*, 99.

3. The Code of Procedure, article 437, requires that the clerk of a District Court, in executing its order for the transfer of misdemeanor cases to the County Court, "shall accompany each case with a certified copy of all the proceedings taken therein in the District Court." Non-compliance with this requirement is available to the accused by plea to the jurisdiction of the County Court. *Brumley v. State*, 114.

4. Certificate of the district clerk which sets out that "the foregoing is a true copy of all the proceedings taken in the above case in the District Court, together with a true statement of the bill of costs accrued therein in the District Court, and that the indictment and all papers relating to the same on file in said court, are herewith transmitted," is a substantial compliance with art 437, Code Crim. Proc. *Gaston v. State*, 143.

V

VARIANCE.

1. Appellant was tried for the theft of a receipt for money executed by himself, but which, as set out in the indictment, did not state from whom the money was received. The State offered in evidence a corresponding receipt, except that it contained a clause stating that the money was received from the alleged owner. The defense objected on the ground of variance, which the State proposed to obviate by proof that the variance was caused by an alteration of the receipt since it was taken by the defendant. The trial court overruled the objection and admitted the receipt, on the ground that the question of alteration was one for the jury. The evidence respecting the alteration was conflicting. *Held* that, though a question of variance arising on a written instrument is ordinarily one of law and for the decision of the court, it was not error, under the circumstances, to admit in evidence the receipt produced by the State, in connection with the proof of its alteration. But *held further*, that the charge to the jury should have submitted to them the issue of fact thus raised, and it was error to refuse a requested instruction properly presenting it. *Huddleston v. State*, 22.

2. A middle name or initial is not recognized by law, nor is its omission or misrecital a matter of any legal significance, unless it appears that injury resulted therefrom to a different person than the one intended. *Delphino v. State*, 30.

3. Indictment for theft alleged the stolen animals to be the property of F. A. Fater; but the proof showed that the middle initial of the owner's name was R. *Held*, not a variance, but a discrepancy of no legal significance. *Id.*

4. The particularity requisite in an information is not necessary in the affidavit on which it is founded, nor are discrepancies between them of any consequence provided there is accordance in substance. They should agree as to the time and venue of the offense and the names of the defendant and the injured party, and there should be substantial conformity in their allegations descriptive of the offense. *Cole v. State*, 67.

5. An information for aggravated assault and battery was founded on an affidavit which, after charging an aggravated assault, alleged specific acts of personal violence. *Held*, that there is no variance between the information and the affidavit. *Id.*

6. Indictment for theft of cattle need not have charged them to be "work steers," but, so charging, affirmative proof that they were "work steers" was essential to a conviction. Proof to the contrary operates as a fatal variance. *Gray v. State*, 411.

VENUE.

See CHARGE OF THE COURT, 17.

EXTRA-TERRITORIAL OFFENSES.

THEFT, 22.

When the record fails to shew proof of the venue of the offense the judgment of conviction will be reversed. *Cross v. State*, 84; *Dreyer v. State*, 503.

VERDICT.

1. Misspelling does not invalidate a verdict when no doubt obtains as to the word intended, or as to its meaning. *Hoy v. State*, 32.

2. The indictment charging theft of property over the value of twenty dollars, a verdict that finds the defendant "guilty of the offense as charged in the indictment" is a sufficient finding that he is guilty of theft of property of the value of twenty dollars or over. *Cohea v. State*, 153.

3. If, at a trial on an indictment for theft, the conviction depends on evidence which proves the receipt and concealment of stolen property, knowing it to have been stolen, correct practice requires that the verdict should show that the conviction was for the receiving and concealment. *Dreyer v. State*, 631.

W.

WAIVER.

The Code of Procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on certain occasions, of which one is when the jury return into court for further instructions. *Held*, that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions. It is incumbent on the trial court and the prosecuting attorney, and not upon counsel for the defense, to see to the personal presence of the defendant in a felony case on all such occasions; and a waiver of that right should affirmatively appear to have been expressly and understandingly made by the defendant in person, and should not be rested on implication. *Shipp v. State*, 46.

WITNESS.

See ACCOMPLICE TESTIMONY.

EVIDENCE.

SEVERANCE.

1. Enforcement of the rule to sequester witnesses is largely discretionary with the trial court, and its action in that respect will be revised only when abuse of the discretion to the prejudice of the appellant is made to appear. *Hoy v. State*, 32.

WITNESS—continued.

2. The Code of Procedure, article 785, provides that husband and wife may testify for each other in all criminal actions, but that, except in a prosecution of one of them for an offense against the other, neither shall testify against the other; and this rule has been held to disqualify either as a witness against a co-defendant of the other. But if either of them be competent as a witness against the party on trial, the other is also. *Daffin v. State*, 76.

3. The principal witnesses for the State being beyond the jurisdiction of the court, the county attorney made affidavit to that fact and introduced their written testimony taken before an examining court. In order to impeach this testimony by showing contradictory statements of the witnesses, the defense sought to introduce their written declarations made before an examining court in the examination of two co-defendants, charged separately with the same offense. *Held*, that the proposed evidence was properly excluded. *Ballinger v. State*, 828.

4. If it be proposed to contradict the testimony of a witness by his deposition taken before an examining court, it is necessary to show him his signature to the deposition, and so much of its contents as involves the statements sought to be impeached. A question which directed the attention of the witness to the "examining trial in this case" sufficiently laid the predicate as to time and place. *Grosse v. State*, 864.

5. It was not necessary to ask the witness if his deposition was read over to him in the examining court. The fact, however, that it was not read over to him might be elicited as a circumstance tending to account for discrepancies between it and his testimony at the final trial of the case. *Id.*

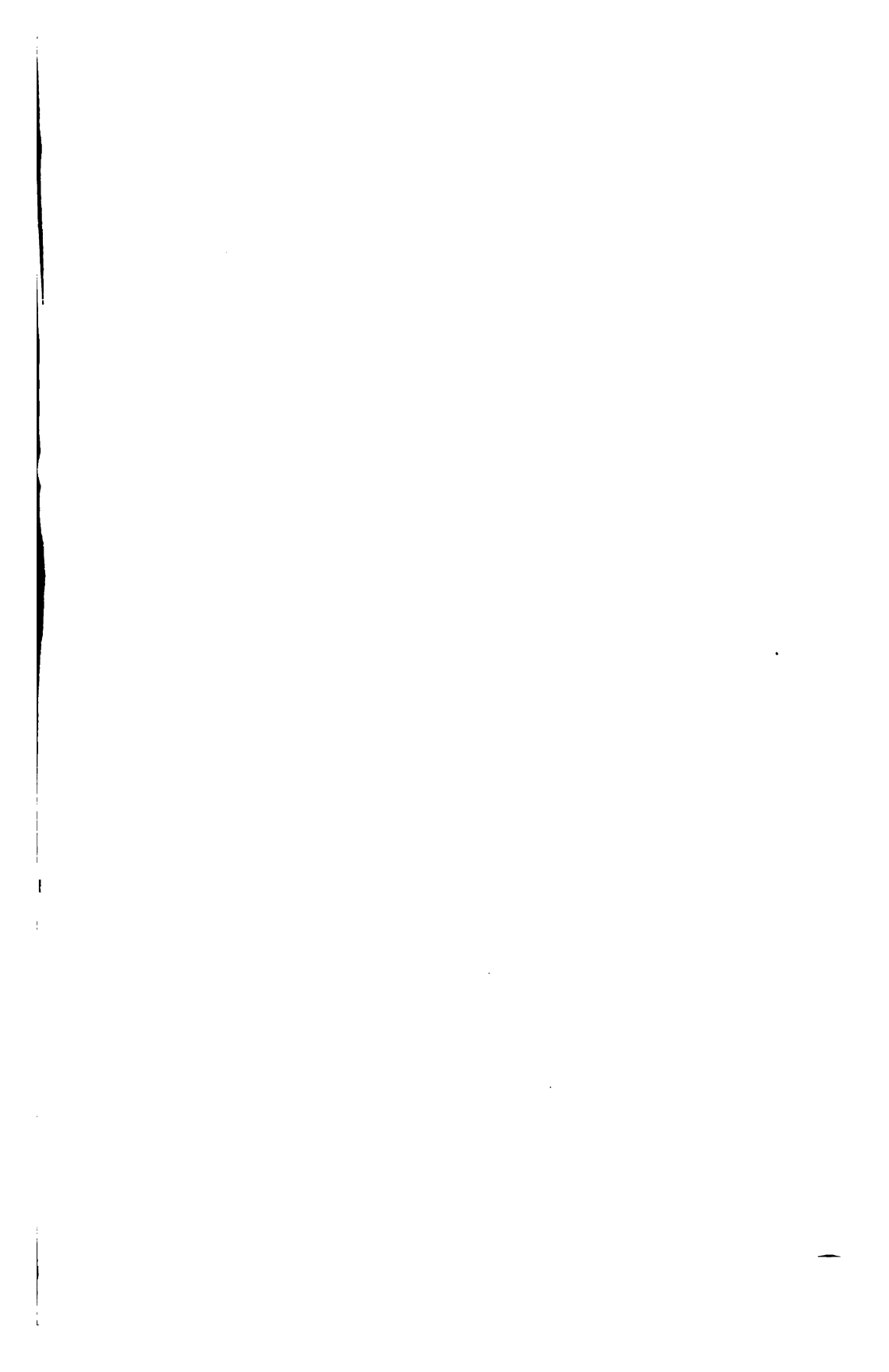
6. If the deposition itself is to be used for the purpose of contradicting the witness, it must be shown that he subscribed it or put his mark to it. But if the deposition was inadmissible because not signed or not authenticated, it was competent to contradict the witness by oral proof of his conflicting statements in the examining court, if they were of a material nature. *Id.*

7. A witness cannot, it seems, be permitted to testify as an expert as to the length of time which would be required to gather a certain number of cattle within the limits of a given "range." He may testify, however, as to the topography of the country, the number of cattle frequenting it, and whether they were wild or gentle, leaving the question of time to the jury for determination. *Tyler v. State*, 388.

8. In a trial for murder it appeared that B., a State's witness, at the time of the homicide lived in the locality where it was committed, but that he had been living in an adjoining county for two or three years before the trial. Assailing his general reputation for truth, the defense asked the impeaching witnesses if they knew

WITNESS—continued.

what that reputation was when he lived where the homicide was committed. On objection by the State the trial court disallowed the question, and ruled that the inquiry should be restricted to the time of the trial. *Held*, that the question was a proper one, and the ruling erroneous. The presumption in favor of the continuance of an established *status* obtains with regard to a witness's reputation for truth, notwithstanding the lapse of three years. *Lum v. State*, 483.



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